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MAY 6 1969

United States Court of Appeals
for the Ninth Circuit

Reuben G. Lenske,

Appellant

v.

Magner Dale Knutsen and Judith
Knutsen,

Appellees

Appellant's Petition for Rehearing

Appeal from the United States District Court
for the District of Oregon
(Robert C. Belloni, JUDGE)

Reuben G. Lenske, 1014 S.W. 2d Ave., Portland, Ore.,
Appellant.

Keane, Haessler, Bauman and Harper, Donald H. Pearlman,
1430 American Bank Building, Portland, Ore.,
Attorneys for Appellees.

FILED

MAY 2 1969

WM. B. LUCK, CLERK

3493

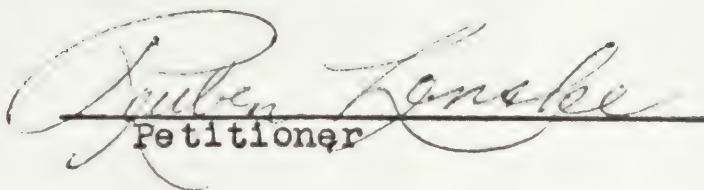
V. 3493

Petition for Rehearing by Reuben Lenske

The court's correct conclusion that Knutsen had no valid damage action against me on account of the mortgage foreclosure suit against him should have been obvious from the beginning. The rest of the court's statements are not necessary for the court's judgment and I would like an opportunity to show the court the wrongness of many of its preliminary statements.

However, that too should not be necessary, for the court should wipe out those statements because of the mootness of the issue regarding the property. In the accompanying affidavit I show that Knutsen did not choose to redeem the property from the Government's foreclosure decree, that no supersedeas bond was filed by me on this appeal, and that the period of redemption of the property expired and that he and he alone could have redeemed and that the Government bid the property in for the amount of its decree. I therefore ask the court to eliminate from its opinion everything but the principle and conclusion that a mortgagor in default has no cause of action for damages against a third party merely because the mortgagee chooses to exercise its clear right to foreclose the mortgage. If the court does not do this I would appreciate and do ask the court for an opportunity to extend this petition for rehearing in order that I may show wherein the statements harmful to me are not based on any sub-

stantial or believable evidence in the record.

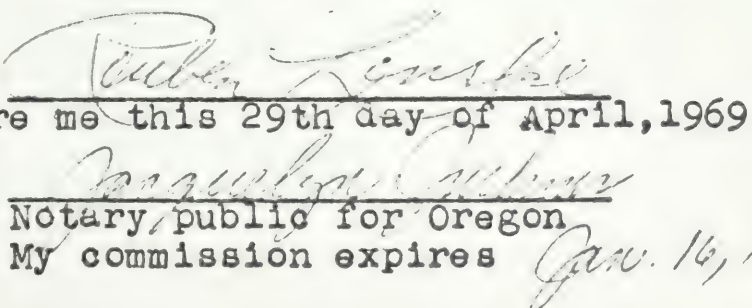

Petitioner

State of Oregon)
)
County of Multnomah)

I, Reuben Lenske, being first duly sworn, on oath depose and say that the redemption period of one year expired in the within foreclosure suit and that Magner Knutsen could have but did not redeem the property; that I did not participate in the foreclosure in any way; that the Government bid the property in for the amount of the mortgage and costs and obtained clear title after the redemption period expired;

That I was in trial for almost a whole week in a jury case after receipt of the opinion in this case on April 16, 1969 and have not had time to complete my petition for rehearing or to append the necessary documents to support this affidavit within the few days I have had available between April 16, 1969 and this date, which is the 14th day since the opinion was filed; but that, given an opportunity, I can do both; that I believe that all issues in this case are moot except the one of damages, which was properly determined by this court.

Subscribed and sworn to before me this 29th day of April, 1969


Notary public for Oregon
My commission expires Jan. 16, 1971

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR RONALD DECATUR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
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IN THE UNITED STATES COURT OF APPEALS
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR RONALD DECATUR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF ISSUE

Defendant's brief raises only one issue:

Did the trial court err in finding that the arrest of defendant
was lawful?

II

STATEMENT OF THE CASE

A. STATEMENT OF PROCEEDINGS

On April 26, 1967, a three count indictment was filed
against defendant Arthur Ronald Decatur by the Grand Jury for the

Central District of California [C. T. 2]. ^{1/} The indictment charged a violation of Title 18, United States Code, §1708, Possession of Stolen Mail and Theft of Mail.

On May 1, 1967, defendant was arraigned and entered a plea of not guilty. On May 23, 1967, trial by jury, commenced before the Honorable Manuel L. Real, United States District Judge, Central District of California [R. T. 4]. ^{2/} Defendant was found guilty on May 25, 1967 [R. T. 238] and, on June 19, 1967, was sentenced to imprisonment for a period of five years ^{3/} on each of Counts One, Two, and Three, to be served concurrently, under the terms of Title 18, United States Code, §4208(a)(2) [C. T. 6].

Jurisdiction of the District Court was based on §§1708 and 3231, Title 18, United States Code. Jurisdiction of this Court to entertain the appeal is deprived from §§1291 and 1294, Title 28, United States Code.

B. STATEMENT OF FACTS

On April 11, 1967, mail carriers Angelo L. Gamero and Henry H. Alpert discovered that a quantity of mail was missing from their respective route relay (storage) boxes [R. T. 35 and 48].

^{1/} "C. T. " refers to Clerk's Transcript of Record.

^{2/} "R. T. " refers to Reporter's Transcript of Proceedings.

^{3/} The trial court directed that the first three years of defendant's sentence in the instant case be served consecutively to the sentence defendant was serving in criminal case No. 35824 [C. T. 6].



At approximately 7:53 p.m., that night, defendant was arrested by Postal Inspectors J. C. Peterson and K. B. Daws [R. T. 67, 68 and 76]. Inspector Peterson searched defendant and found a key in his right hand pocket [R. T. 77]. This key was used to open the trunk of a 1959 Rambler automobile where various evidentiary items were discovered and seized [R. T. 76 and 94].

At defendant's trial, the Government offered as evidence the items seized from the trunk of the 1959 Rambler on April 11, 1967 [R. T. 94]. Defendant contended that the items were the result of an unlawfully search and seizure and orally moved to suppress the items [R. T. 69 and 95]. Judge Real, after having heard the evidence on defendant's motion outside the presence of the jury, found that there was reasonable cause for the arrest and that the search was incident to a lawful arrest [R. T. 96]. Government's Exhibits No. Two, Four, Five and Six were thereafter admitted into evidence [R. T. 140].

III

ARGUMENT

DEFENDANT WAS LAWFULLY ARRESTED

1. Under the Circumstances of the Instant Case, It Is Not Necessary For This Court to Determine Whether Title 39, United States Code, §3523(a)(2)(k), In Itself Authorizes Postal Inspectors to Make An Arrest
-

Section 3523(a)(2)(k), Title 39, United States Code, defines the duties and responsibilities of Postal Inspectors to include the following:

"In any criminal investigation, develops evidence, locates . . . suspects; apprehends and affects arrests of postal offenders. . . ."

The Fifth Circuit Court of Appeals recently held that this section does not, in itself, authorize postal inspectors to make an arrest on their own. Alexander v. United States, 390 F.2d 101 (5 Cir. 1968). Defendant now urges this Court to follow the Alexander decision.

The Government has previously urged this Court to hold that §3523(a)(2)(k) does authorize postal inspectors to make arrests. See Ward v. United States, 316 F.2d 113 (9 Cir. 1963); and Neggo v. United States, 390 F.2d 609 (9 Cir. 1968). However, because of the circumstances of the cases, this Court has heretofore found it unnecessary to decide this issue. In view of this

Court's previous decisions and that Congress has now added a new section (18 U. S. C. §3061) to the Criminal Code specifically granting postal inspectors the authority to make warrantless arrests, the Government does not now urge that this Court hold that §3523 authorize such arrests. However, the legislative history of §3061 makes it clear that the purpose of the new section was to clarify the authority of postal inspectors rather than to grant new authority. See House of Representatives Report No. 1725, 90th Congress, 2d Session, July 17, 1968.

2. The Postal Inspectors Had Sufficient Reasonable Cause to Believe That Defendant Had Committed a Felony to Effect a Lawful Arrest Under State Law
-

Assuming that the arrest of defendant was not authorized by §3523(a)(2)(k), the validity of the arrest must be determined by looking at the law of the state where the arrest occurred. See United States v. Di Re, 332 U. S. 581 (1948). In California, the authority for a private person to arrest another, without a warrant, is found in §837 of the California Penal Code. That section provides, in part, as follows:

"A private person may arrest another.

* * * *

"3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it. "

In the Ward case, supra, this Court noted that an arrest under §837(3) must satisfy two requirements: "a felony must have been committed by someone; and (b) 'reasonable cause must exist' to believe the person arrested committed the felony." 316 F.2d at 117. In the instant case, the theft of the mail from the carrier's relay boxes constituted a felony. See §§1708 and 1, Title 18, United States Code. Therefore, the only issue is whether the postal inspectors had reasonable cause to believe that defendant had committed the felony.

In Ward, this Court made the following comment concerning what constitutes reasonable cause:

" 'Reasonable cause for arrest' is no esoteric formula. Would the information and knowledge the arresting person had lead a person of ordinary reasonable judgment, intelligence, care and prudence, to believe the person to be arrested had committed the felony? [Citation of cases omitted.]

"The belief may amount only to an honest and strong suspicion that the person arrested is guilty of a felony." [Citation of cases omitted.]
316 F.2d at 117.

When that standard is applied to the circumstances of this case, it shows that the arrest of defendant was predicated upon reasonable cause.

Inspectors Peterson, Daws, and Collier staked-out an area behind an apartment complex at 4555 Santa Barbara Avenue at approximately 5:40 p. m. on the night of defendant's arrest [R. T. 123 and 124]. Mail from two relay (storage) boxes had been discovered missing that day and on previous occasions mail taken from relay boxes had later been discovered dumped in garbage bins behind this apartment complex [R. T. 92]. The Inspectors did not have any information as to who was taking the mail but Inspector Peterson had received information that a "dirty white or light blue Nash Rambler" had been observed in the vicinity where some of the previous losses had occurred [R. T. 75].

After the stake-out was established, the following events took place:

1. At approximately 7:40 p. m., Peterson checked the trash bins [R. T. 67 and 120];
2. Approximately fifteen minutes later, he received a radio message from Collier that "the man just drove up to the far bin, opened up the trunk of the car and is dumping something into the garbage bin like mad. He is making several trips." [R. T. 87];
3. Collier told Peterson that the man was in a white Nash automobile [R. T. 75];
4. Peterson then ran back to the area of the garbage bins and again looked into the bins [R. T. 89]. (The trash bins had been under Collier's surveillance between 7:40 p. m. and this time and Peterson knew that no one else had gone to the bin

since he had checked it [R. T. 91 and 128-129]);

5. In one of the bins which Peterson had previously checked and had determined that it was empty at that time, he saw a large quantity of torn mail [R. T. 67 and 68];

6. Peterson saw defendant attempting to enter the driver's side of a Nash Rambler automobile [R. T. 67];

7. Peterson recognized defendant as a man whom he knew had previously been convicted of the crime of possession of stolen mail [R. T. 72, 73 and 76];

8. Peterson then told Daws to place defendant under arrest [R. T. 76].

Based upon the information he had received and his own observations, Inspector Peterson had reasonable cause to believe that defendant was guilty of a felony. Consequently, the requirements of §837(3) were satisfied and the arrest of defendant was a lawful citizen's arrest.

3. The Search of the Car Trunk By
Inspector Peterson Was Incident
to the Lawful Arrest of Defendant
and Was Within the Scope of That
Arrest

Defendant does not specifically contend that the search of the car trunk was beyond the scope of Peterson's authority to search even if incident to the arrest. Nevertheless, the Government believes that a brief response on this point is appropriate.

The record shows that, immediately preceding the arrest of defendant, Peterson observed defendant attempting to enter the driver's side of the Nash automobile [R. T. 67]. Defendant was placed under arrest and Peterson removed the key from him and opened the trunk of the Nash and extracted the items that were used as Government's Exhibits Two, Four, Five and Six [R. T. 91 and 92].

At least since the pronouncement of the Supreme Court in Carroll v. United States, 267 U.S. 132 (1925), the proposition that an automobile may be searched without a warrant if incident to an arrest has been settled. Furthermore, both California and Federal courts have held that an automobile not occupied by the arrestee at the time of the arrest may be searched incident thereto even if some considerable distance intervenes between the arrest site and the location of the vehicle. Rhodes v. United States, 224 F.2d 348 (5th Cir. 1955) (100 yards); United States v. Fortier, 207 F. Supp. 516 (D. C. Conn. 1962) (250 feet); People v. Williams, 67 Cal.2d 226, 60 Cal.Rptr. 472, 430 P.2d 30 (1967) (one block); People v. Dailey, 157 Cal.App.2d 649, 321 P.2d 469 (1958) (50-60 feet).

Even if the search could not be found incident to the arrest of defendant, it was still a valid search under the doctrine of "exigent circumstances". This doctrine, briefly stated, is that under some circumstances peace officers are justified in making a search without a warrant in order to preserve evidence, apprehend suspects, etc. This doctrine may be applied to situations

occurring before or after arrests.

General speaking, the Supreme Court first gave voice to this doctrine, in relation to automobile searches, in Carroll v. United States, supra, at page 151 when it stated:

"[There is a] difference as to necessity between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods . . . concealed in a movable vessel where they readily could be put out of reach of a search warrant."

The Court has also stated in Preston v. United States, 376 U.S. 364, 366 (1964) that:

"Questions involving searches of motorcars or other things readily moved cannot be treated as identical to questions arising out of searches of fixed structures like houses.

"What may be an unreasonable search of a house may be reasonable in the case of a motorcar."

In regard to searches under exigent circumstances which occur after an arrest, this Court has generally stated in Boyden v. United States, 363 F.2d 551, 553 (9th Cir. 1966):

"[It is the] right and duty on part of an arresting officer to seize the fruits of the crime and the instruments of the crime as evidence, at

the time of arrest, if his leaving them unseized would create a danger that they would be destroyed. "

Further, this Court has stated in Travis v. United States, 362 F.2d 477, 480-81, fn. 3 (9th Cir. 1966):

"Where it is not practicable to secure a warrant to search a vehicle for contraband goods because the vehicle can be quickly removed out of the locality or jurisdiction, the vehicle may be searched by a proper official then having probable cause to believe that the vehicle contains such goods. "

It is only necessary to briefly reiterate some of the facts relevant to the search to show that the search was within the scope of Peterson's authority incident to the arrest. Peterson knew that quantities of mail from two relay boxes were missing; he had been informed that the defendant was dumping mail into the garbage bins; and, when he saw defendant, defendant was trying to get into the driver's side of the car. The search of the car trunk occurred immediately after defendant was arrested. Based on this record, there can not be any doubt but that the search was almost contemporaneous with defendant's arrest. Moreover, the area searched, the trunk of the car, was only a few feet removed from the area where defendant was arrested, the door of the car.

Additionally, Peterson was justified in searching the car trunk under the exigent circumstances present. He knew that

defendant had dumped some mail in the garbage bin. He did not know if there was any more mail in the car trunk. If there were stolen mail in the trunk and he left it unattended, the possibility existed that someone would have moved the car or taken the mail prior to his return. Under these circumstances, he had a perfect right to search the trunk for the fruits of defendant's crime.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
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See Vol.
3413

JUN 9 1969
FILED

No. 22342

MAY 27 1969

In the

United States Court of Appeals

For the Ninth Circuit

FARMERS INSURANCE EXCHANGE,

Appellant,

vs.

JOE ROSE, JR. and VERONICA ROSE, his wife,

Appellees.

Appeal from the United States District Court
for the District of Arizona

Petition for Rehearing

FENNEMORE, CRAIG, VON AMMON,
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No. 22342

In the
United States Court of Appeals
For the Ninth Circuit

FARMERS INSURANCE EXCHANGE,

Appellant,

vs.

JOE ROSE, JR. and VERONICA ROSE, his wife,

Appellees.

Appeal from the United States District Court
for the District of Arizona

Petition for Rehearing

Appellant, Farmers Insurance Exchange, petitions the court for a rehearing in the above entitled matter on the ground and for reason hereinafter set forth.

The petitioner's ground for rehearing is that the court in its opinion has failed to discuss in any way or to resolve the ultimate key issue in this appeal, which was the primary issue discussed at the oral argument, namely, the effect of the following language in the petitioner's policy:

"When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle responsibility law, such insurance as is afforded by this policy for bodily injury liability or property damage liability shall

comply with the provisions of such law *to the extent of* the coverage and *limits of liability* (Note: \$10,000/\$20,000. A.R.S. § 28-1170 B 2 (a) (b)) *required by such law*, but in no event in excess of the limits of liability stated in this policy.” (Emphasis supplied)

Stated simply, the language just quoted unequivocally provides that if there is coverage (as here) solely by virtue of a provision of the Arizona Financial Responsibility Act such as A.R.S. § 28-1170 F 1, such coverage extends only to the “limits of liability required” by the Financial Responsibility Act which is \$10,000/\$20,000.

In addition to being the prime issue presented and discussed at the oral argument, this issue was discussed in Appellant’s opening brief at page 13 and referred to in Appellant’s reply brief at page 3.

The issue identified above is and always has been a key issue in this lawsuit. If resolved favorably to this petitioner, this court’s decision would necessarily result in a reversal rather than an affirmance of the District Court’s judgment.

The only specific portion of this court’s opinion which your petitioner questions by this petition is the last four paragraphs of the opinion. The court holds in these paragraphs that petitioner’s liability is not limited to the \$10,000/\$20,000 amounts specified in A.R.S. § 28-1170 B (2) (a) and (b), but extends to the full limits of \$50,000/\$100,000.

The court bases this holding solely and expressly on *Sandoval v. Chenoweth*, 102 Ariz. 241, 428 P.2d 98. In *Sandoval* the policy in question did not contain a clause such as was contained in the policy in this case, which clause is quoted above.

As was pointed out at the oral argument, in *Sandoval* there are three separate places in the court’s opinion where the Arizona Supreme Court states or implies that if the policy does (as is the case here and *was not* the case in *Sandoval*) contain a limitation of the amount of insurance available when there is liability under the policy because of the Arizona Financial Responsibility Act, liability under the policy will be limited to \$10,000/\$20,000.

“[S]ince the policy itself contains no differentiation as to . . . the amounts of the protection, we find no basis for curtailment of . . . coverage.” 428 P.2d 103

Comment: The necessary corollary, of course, is that there would be a curtailment of coverage if, as here, the policy does provide for different amounts of protection.

“[S]ince the . . . policy did not set up different provisions for (different types of insureds, they will be treated the same.)” 428 P.2d 104.

Comment: Again, the clear and necessary inference is that the policy can provide for different limits of liability when liability results by virtue of coverage imposed by fiat of law as distinguished from liability resulting from a risk expressly covered under the terms of the policy.

“[T]he second sentence of (A.R.S. § 28-1170 G) is ineffectual to limit coverage to the minimum amount required.” 428 P.2d 104

Comment: Granted, but this doesn't mean that an express policy provision is ineffectual to limit liability. To the contrary the statute (A.R.S. § 28-1170 G) and the court in *Sandoval*, in the remarks quoted above, indicates that such a provision is effective to limit liability.

The consideration of the policy provision not discussed by the court in its opinion would allow the court to sustain its essential holding in *Weeks v. Atlantic National Insurance Company*, 9 Cir., 370 Fed. 2d 264, provided that there is a policy provision such as there, in fact, is in this case.

Parenthetically, it should be noted that the fact that the policy in this case is not certified does not effect the results suggested above by your petitioner. As the opinion of this court indicates, the Arizona Supreme Court has abolished any distinction between certified and noncertified policies in determining whether there is responsibility under the Arizona Financial Responsibility Act. Had this distinction not been abolished petitioner would not have been charged with responsibility in this action in the first place. This is evident because the court held as it did in its opinion because of A.R.S. § 28-1170 F 1 which by its terms applies only to certified policies, which this policy was not, as is indicated in footnote 1 to the opinion.

It is obvious from the last four paragraphs of the court's opinion, from footnote 6 to its opinion and from the *Weeks* case this court feels that, as an original proposition, liability should not be imposed for an amount in excess of \$10,000/\$20,000 under the applicable Arizona statutes. The court holds, as it does in its opinion in this case, solely because of its belief as to what the Arizona Supreme Court would do. However, this court has failed to consider the fact that in this case there is an express policy provision which the Arizona Supreme Court has indicated would bring about a different result from the decision of the Arizona Supreme Court in *Sandoval*, a result this court has indicated it thinks is appropriate and correct.

Accordingly, this petition for rehearing should be granted so that the court can consider the key issue not previously considered or resolved and alter its opinion to provide that in view of the language of the policy before the court in this case the decision of the District Court should be reversed.

FENNEMORE, CRAIG, VON AMMON,
McCLENNEN & UDALL

By JOHN J. O'CONNOR III

900 First National Bank Building
Phoenix, Arizona 85004

Attorneys for the Petitioner

I certify that in my judgment the above Petition for Rehearing is well founded and that it is not interposed for delay.

JOHN J. O'CONNOR III

See Vol.
3479

JUN 9 1969

No. 22443 ✓

In the
United States Court of Appeals
For the Ninth Circuit

ALLSTATE INSURANCE COMPANY, an Illinois
corporation,

Appellant,

vs.

NELSON CHRISTIAN DORR and AEDA DORR,
his wife, surviving parents of FELIX
MATTHEW DORR, deceased, et al,

Appellees.

**Petition for Rehearing
In Banc**

O'CONNOR, CAVANAGH, ANDERSON
WESTOVER, KILLINGSWORTH
& BESHEARS

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No. 22443

In the
United States Court of Appeals

For the Ninth Circuit

ALLSTATE INSURANCE COMPANY, an Illinois
corporation,

Appellant,

vs.

NELSON CHRISTIAN DORR and AEDA DORR,
his wife, surviving parents of FELIX
MATTHEW DORR, deceased, et al,

Appellees.

Petition for Rehearing
In Banc

COMES NOW Appellant, ALLSTATE INSURANCE COMPANY, an Illinois corporation, by and through its attorney undersigned, and pursuant to Rules 35 and 40 Fed. R. of App. Proc. and Rule 12 of this Court, respectfully petitions for a rehearing In Banc of this cause and requests that upon such rehearing the judgment of this Court shall be modified as follows:

(1) That this cause shall be remanded to the United States District Court for the District of Arizona with instructions to decide the issues presented therein on the merits;

(2) In the alternative, that this Court grant the petition for rehearing In Banc to clarify portions of the Opinion, and specifically to delete certain erroneous statements contained therein.

This case is suggested as one appropriate for rehearing In Banc because of the seriousness of the constitutional issue involved, since it affects a large segment of the citizens of the State of Arizona.

This petition for rehearing In Banc is based upon the following grounds:

1. Request That the Judgment of the Lower Court Be Reversed and Remand the Case to Be Decided on Its Merits.

The decision does not face the crucial issue in the case that the insurance contract, when issued, did not include the judicial pronouncement that a non-certified insurance policy would not be void *ab initio* because of fraudulent misrepresentation by the applicant.

This Court, in the Opinion, has in the guise of upholding purported social and economic objectives of the Arizona Legislature ratified the Arizona Supreme Court's unconstitutional application and interpretation of an Arizona Statute which was not intended to be so applied by the Arizona Legislature. The Court quoted A.R.S. § 28-1170(F) in Footnote No. 1 of the Opinion, and relied upon the language contained therein as the cornerstone of its Opinion. However, the Court did not mention A.R.S. § 28-1170(A) which defines the term "motor vehicle liability policy" as used in A.R.S. § 28-1170(F) which the Legislature defined in Subsection (A) as:

... an owner's or an operator's policy of liability insurance, certified as provided in § 28-1168 or § 28-1169 as proof of financial responsibility, and issued, except as otherwise provided in § 28-1169, by an insurance carrier duly authorized to transact business in this state to or for the benefit of the person named therein as insured.

The Legislature recognized the distinction between a certified and a non-certified policy at the time it enacted A.R.S. § 28-1170, as indicated by the express wording used in that Statute. Thereafter, the Arizona Supreme Court, in *Jenkins v. Mayflower Insurance Exchange*, 93 Ariz. 287, 380, P.2d 145 (1963), decided March 27, 1963, that the omnibus clause was a part of every motor vehicle liability policy regardless of how denominated. The *Jenkins* decision did not *per se* make all policy defenses void, as the only clause presented to the Court in that case was the omnibus provision. It was not until the case of *Sandoval v. Chenoweth*, 102 Ariz. 241, 428 P.2d 98 (1967), decided May 25, 1967, that the Arizona Supreme Court notified insurance companies doing business in Arizona that no violation of the policy would defeat or void a policy and specifically that the failure of an insured to notify the insurer of a pending suit against the insured was not grounds for avoiding liability on the policy.

During the period between the *Jenkins* decision and the *Sandoval* decision, Appellee Gutierrez filed an application for insurance with Appellant, Allstate, dated January 29, 1964. The holding of this Court in the instant case required that Allstate, at the time it issued the policy to Mrs. Gutierrez speculate and guess the meaning of an interpretation placed upon the Statute by the Arizona Supreme Court at a later date. The Supreme Court of the United States has pointed out in a number of cases that a citizen cannot be required to guess at the meaning of a Statute, and the Statute must delineate what acts are permissible and what are not, in clear and understandable terms. See *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); Cf., *Thornhill v. State of Alabama*, 310 U.S. 88 (1940); *Winters v. New York*, 333 U.S. 507 (1948).

Federal Courts have a duty to declare a State law unconstitutional where the Statute, on its face or as applied, impinges upon constitutional rights guaranteed by the Federal Constitution. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Farmers Ed. & Coop. Union v. Wday*, 360 U.S. 525 (1959); *Bates v. Little Rock*, 361 U.S. 516 (1960).

The general rule set forth in the Opinion of this Court that the judiciary will not invalidate a legislative act unless it is clear that such legislation is an invalid exercise of the police power of the State is well recognized. Appellant is not questioning the legislative policy of § 28-1170(F), but the judicial interpretative power under the guise of protecting members of the public by arbitrarily interfering with private business and contractual relationships, which does not tend to promote health, safety or welfare of society.

The *Mayflower* and *Sandoval* decisions, *supra*, must be recognized as public policy decisions. Thus, in *Sandoval*, the Court stated that the *Mayflower* decision, and its Opinion in the companion case of *Schechter v. Killingsworth*, 93 Ariz. 273, 380 P.2d 136 (1963):

... express the *public policy* of this state in regard to *judicial implementation* of the Financial Responsibility Act. (428 P.2d at 100; Emphasis Added)

The Court, in *Mayflower* and *Sandoval*, thus gleaned from the Safety Responsibility Act a "public policy" which the Court "judicially implemented" in those decisions.

In the present case, however, this Court is not required to resort to "public policy"; nor is this Court required to "judicially implement" any Statute. All that is required is that the plain terms of A.R.S. § 20-1109 and the cases construing this Statute which were cited by Appellant in its Opening Brief be given the effect so clearly intended by the Legislature. A.R.S. § 20-1109 provides as follows:

All statements and descriptions in any application for an insurance policy or in negotiations therefor, by or in behalf of the insured, shall be deemed the representations and not warranties. Misrepresentation, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy unless:

1. Fraudulent; or
2. Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
3. The insurer in good faith would either not have issued the policy, or would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise.

Appellant has alleged facts which, under A.R.S. § 20-1109, entitle it to a declaration that the policy was void and never came into existence. In any event, it is submitted that Arizona and all other jurisdictions in the United States always have had, and now have, a strong public policy against fraud.

This precise question has arisen and been adjudicated in Appellant's favor in other jurisdictions. For example, in *Safeco Insurance Company of America v. Gonacha*, 142 Colo. 170, 350 P.2d 189 (1960), the Colorado Court rejected a claim that the absolute liability provision in the Colorado Financial Responsibility Law precluded the insurer from avoiding the policy for false representation as to prior cancellations. Likewise, in *Temperance Insurance Exchange v. Coburn*, 85 Id. 468, 379 P.2d 653 (1963), the Idaho Supreme Court held that:

Under the facts of this case, we conclude that this automobile liability insurance policy was not obtained or issued under the requirements of the Idaho Motor Vehicle Safety Responsibility Act, that the terms and conditions of said policy imposed no absolute liability upon the appellant, and that, therefore, upon proof of Coburn's knowledge that the application contained false statements material to the risk when he signed said application appellant was entitled to cancel the policy. The judgment of the trial court is reversed and the cause is remanded with instructions to enter judgment for the appellant, Temperance Insurance Exchange (379 P.2d at 657)

Similarly, in *Tri-State Ins. Co. v. Ford*, 120 F.Supp. 118 (D.N.M. 1964), the Court, in construing Texas law, held:

It is only reasonable that the Texas Act in establishing a liability between the insurer and third persons should

restrict such liability to instances wherein a certification has been made by the insurer that the insured is in a position by virtue of insurance to financially respond in damages in the event of future accidents. *To hold in the absence of clear legislative intent that every insurer who issues a public liability policy becomes irrevocably responsible to an injured third person at the time the accident occurs would be to place an unreasonable and unconscionable burden upon the insurance company. Such a statutory construction would place a premium upon the practice of deceit and fraud by all prospective purchasers of insurance.* (120 F.Supp. at 126; Emphasis Added)

This Court, in construing the Oregon Financial Responsibility Law, observed that:

This statute provides that liability of the insurer becomes absolute at the time of an accident and that he cannot thereafter avoid the policy on the ground of fraud of the insured. O.R.S. 486.551. Such liability, however, is specifically limited in operation to policies issued under the financial responsibility law.

(*Mayflower Insurance Exchange v. Gilmont*, 280 F.2d 12 (1960), at p. 15)

See also *Buzzone v. Hartford Accident and Indemnity Co.*, 23 N.J. 447, 129 A.2d 561 (1957). In *Buzzone*, where New York law was applied, the license of a New York driver had been suspended pending proof of his financial responsibility. Using an assumed name, the driver had obtained a policy from Hartford. In holding that Hartford could avoid the policy because of the fraud of the insured, the New Jersey Supreme Court stated that the New York Financial Responsibility Act:

. . . is designed to subject insurers to absolute liability only where they are aware of the status of the applicant as a member of the statutory class. (129 A.2d at 565)

The New Jersey Superior Court, App.Div. in *Buzzone* (41 N.J. Super. 511, 125 A.2d 551) applied New York law. A New York Court had previously construed the New York Financial Responsibility Act as follows:

It differentiates between car owners who have shown themselves to be irresponsible, and those who have not. It declares that when those who carry liability policies through legal compulsion cause damage in automobile operation, their insurance carriers are absolutely liable for the resulting loss; but it lays down no such rule in the case of an automobile owner voluntarily carrying such a policy, whose responsibility has never been questioned. *The construction contended for by plaintiff would encourage fraud and deceit, and would create a legal relationship so unfair and unreasonable as to be unconscionable.* Cohen v. Metropolitan Casualty Ins. Co., 233 App.Div. 340, 252 N.Y. Supp. 841 (1931). (Emphasis Supplied) (125 A.2d at 556)

With reference to the last sentence from the above-quoted passage from *Cohen*, the New Jersey Court in *Buzzone* observed:

The essence of the fraud, deceit and imposition to which the court referred lies in subjecting to the statutory liability an insurer who did not intend to assume it, and is the same whether the insured is within or beyond the mentioned category.

* * *

To state it affirmatively, the sweeping statement that the insurer should be protected against fraud, deceit and imposition shows an intention to hold the insurer under the act only where it certifies the policy to the Commissioner and thus evidences its awareness of and its willingness to assume the statutory obligation as to the specific policy. (125 A.2d at 557)

It should be noted that in matters relating to insurance coverage, the Arizona Supreme Court follows the law in California. See *e.g.*, *Jenkins v. Mayflower Insurance Exchange, supra*, wherein the Court held that the omnibus clause in the Arizona Safety Responsibility Act is a part of every insurance liability policy in Arizona; and, in so holding, followed the California decision in *Wildman v. Government Employees' Insurance Co.*, 48 Cal.2d 31, 307 P.2d 359 (1957). Likewise, in *Sandoval, supra*, the Court said that:

This court has been previously inclined to follow California in its judicial interpretation of the Financial Responsibility Act. (428 P.2d at 103)

But even in California, an insurer is entitled to a judicial declaration that its policy of automobile liability insurance is void where the same has been procured by the false and fraudulent representations of its insured. See *e.g.*, *Allstate Insurance Company v. McCurry*, 224 Cal.App.2d 271, 36 Cal.Rptr. 731, 733 (1964), wherein the California Court held:

The law seems clear that where the insured has secured a policy of automobile liability insurance through fraud, breach of warranty, or material misrepresentation, the insurer can rescind the policy as of its inception, notwithstanding the existence of any rights in third parties who were injured by the acts of the insured which occurred before the rescission.

See also *Allstate Insurance Company v. Golden*, 187 Cal.App.2d 506, 9 Cal.Rptr. 754 (1960).

It is, of course, possible to construe *Mayflower* and *Sandoval*, *supra*, and A.R.S. § 28-1170(F) to preclude an insurer from avoiding a voluntary automobile liability policy for fraudulent misrepresentations in its procurement. But if this had been the intention of the Arizona Supreme Court or the Arizona Legislature, surely the Court or the Legislature would have so stated in clear and explicit terms. On the contrary, the Arizona Supreme Court has often stated that it will permit an insurer to avoid a life insurance policy when the same has been procured by false representations. *First Nat. Ben. Soc. v. Fiske*, 55 Ariz. 290, 101 P.2d 205 (1940); *Illinois Bankers' Life Ass'n v. Theodore*, 44 Ariz. 160, 34 P.2d 423 (1934); *American Nat. Ins. Co. v. Caldwell*, 70 Ariz. 78, 216 P.2d 413 (1950); *Modern Woodmen of America v. Stevens*, 70 Ariz. 232, 219 P.2d 322 (1950). And the Arizona Legislature has also plainly indicated that "an insurance policy" of any type may be avoided if it can be proven that the policy was procured by false representations as to facts material to the risk assumed. (A.R.S. § 28-1109) For this Court to hold otherwise, it must assume that the Arizona Supreme Court and the Arizona Legislature are now willing to countenance fraud. This cannot be the law.

In this regard, see *Virginia Farm Bureau Mutual Insurance Co. v. Saccio*, 204 Va. 769, 133 S.E.2d 268 (1963), wherein the Virginia Court permitted an insurer to avoid an assigned risk policy because the same had been obtained by fraudulent representations of the insured. In so holding, the Court stated:

The right to rely on fraud as a defense should not be defeated in the absence of a clear showing that such was intended, either by legislative act or by the expressed intention or the course of conduct of the party entitled to so rely. (133 S.E.2d at 275)

The holding of this Court in the instant case will solicit and encourage operators of motor vehicles to obtain automobile liability insurance by fraudulent misrepresentations as this class will be placed in the envious position of having dollars to gain and absolutely nothing to lose. In addition, the decision, instead of encouraging drivers to drive more carefully, will more likely discourage drivers from obtaining automobile liability insurance, which will lead to more uninsured motorists on the roads if the insurance companies accept the advice of this Court and increase their rates to spread the costs over larger numbers of the motoring public. This may be the high water mark of civil judicial penalization of the general public who are safe drivers, and honest and truthful citizens, and protect that element of society who will procure insurance based upon false statements and deceit. It is strongly suggested that if the public policy against fraud and deceit is balanced against the possibility that an innocent third party may have to suffer because an applicant obtained insurance under untruthful circumstances, the latter must admit to the well-founded and engrained principle that the law encourages the public to be honest.

Thus, with some imagination, we can envision a situation whereby an applicant for insurance would misrepresent his driving record; obtain insurance from a company in Arizona; pay a much lower rate based upon his sworn statements in the application; be involved in an accident injuring a third party; have his insurance cancelled subsequent to the accident; go to a different insurance

company and obtain insurance based upon fraudulent statements, including the non-disclosure of the prior accident; be involved in another accident injuring a different party; have his automobile insurance cancelled by the new company, which procedure will go on *ad infinitum* simply because the law condones fraud and deceit in applying for automobile liability policies. The alternative suggested by this Court of solving this possible problem creates such an unreasonable and arbitrary burden upon the method of doing business as to substantially interfere with the liberty of contract and there is no reasonable relationship to the end sought to be accomplished by the judicial interpretation of the legislative act in this State. As previously mentioned, in the alternative, the companies will merely increase the rates for all members of the driving public, which in turn will prevent a certain percentage of lower economic groups from obtaining insurance which will increase the number of uninsured motorists driving on the highways of the State of Arizona, completely nullifying the Legislative policy sought to be accomplished by the Arizona Financial Responsibility Act. Nor should the Court be led to believe that the general public will not take advantage of the situation since shortly after the decision was rendered in this matter, the entire history of this case, including the facts of fraud and misrepresentation by Mrs. Gutierrez, was published by one of the Phoenix newspapers, on the front page, for all potential defrauders and deceiters to become aware of and follow.

2. The Opinion Should Be Modified to Exclude or to Explain Certain Language Contained Therein.

Appellant takes issue with this Court's statement found on p. 4 of the Opinion that: "It could keep her on the road, in a jurisdiction which required a driver to be insured." At no time, to the undersigned's knowledge, has Arizona ever required a driver of a motor vehicle to be insured prior to operating a motor vehicle on the highways of this State. Arizona falls within the classification of what has come to be known as the "one-bite" jurisdictions whereby financial responsibility does not have to be shown until after an individual has been involved in an accident. This Court and the Arizona Supreme Court have held on numerous occasions

that Arizona does not require a driver to be insured prior to an accident. Thus, the Court's argument based upon this statement above referred to falls of its own weight when the Court argues that Allstate armed Mrs. Gutierrez with a dangerous instrumentality which she could not have otherwise possessed. Mrs. Gutierrez was not required to have any insurance in the State of Arizona prior to this accident, as Arizona is not a compulsory insurance state, and thus, there is no way that even if Allstate had refused to sell Mrs. Gutierrez an insurance policy it could have kept her off of the roads.

3. Conclusion

This case illustrates how the Financial Responsibility Act of Arizona, as interpreted by the Arizona Supreme Court, is under the facts of this case so irrational and arbitrarily directed against Appellant as to deprive it of its constitutional rights. While all defenses to an insurance contract disappear upon the occurrence of an accident because of a provision of A.R.S. § 28-1170, the maximum liability of an insurance company is not limited to the amounts set forth in the same Statute or required by law as held by this Court in *Weekes v. Atlantic National Ins. Co.*, 370 F.2d 264. See also *Sandoval v. Chenoweth*, *supra*. There can be no constitutional basis in applying one portion of a Statute to a citizen and not applying another section of the same statute to the same person.

Based upon the foregoing, it is respectfully submitted that the decision heretofore rendered by this Court in this case should be reconsidered, and that the Court should enter its judgment reversing the U. S. District Court for the District of Arizona, or in the alternative, the Opinion should be re-written in the specific portion which is misleading and erroneous as heretofore mentioned.

Respectfully submitted,

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MAY 22 1969

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSIE HUGHES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

MAY 13 1969

APPELLEE'S BRIEF

WM. B. LUCK, CLERK

APPEAL FROM
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FOR THE CENTRAL DISTRICT OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSIE HUGHES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

STATEMENT OF THE CASE AND JURISDICTION

Appellant, Jessie Hughes, was found guilty following a trial by jury on a nine count indictment charging three unlawful sales of heroin in violation of Title 21, United States Code, Section 174, three unlawful concealments of heroin in violation of Title 21, United States Code, Section 174, and three unlawful sales of heroin in violation of Title 26, United States Code, Section 4705(a).

Notice of Appeal was timely filed [T. 41] and leave to proceed in formal pauperis was requested [T. 39]. The trial court denied the request [T. 44]. On August 18, 1968, this court granted leave to proceed in formal pauperis.

Jurisdiction of this court to review the judgment below is predicated on Title 28, United States Code, Section 1291 and 1294.

STATEMENT OF FACTS

On April 5, 1967, Agent William B. Jackson of the Federal Bureau of Narcotics had a conversation on the telephone with an informant named Bill Davis (R. 73-74]. During that conversation, Davis introduced Jackson to a man called "Gizmoe" who told Jackson he had some heroin to sell for \$175 [R. 74]. Later that day Jackson met with "Gizmoe" [R. 77]. "Gizmoe" was the Appellant, Hughes [R. 74-77]. After Davis introduced Jackson to Hughes he left [R. 78], leaving the two men in Jackson's car (R. 77; 93]. Jackson asked Hughes if he had the stuff and Hughes replied "yes" and removed from his mouth a cellophane bag containing fourteen (14) multi-colored balloons which contained tan powder. Jackson told Hughes the price was rather high and Hughes replied, "Well, I will try to do better next time but right now it has to go for \$175.00." Jackson gave Hughes \$175.00 and Hughes got out of the car [R. 78] and entered the informant's house [R. 79]. The informant came out of the house and drove off with Jackson [R. 78.].

On April 10, 1967, Jackson met with the informant and two other agents [R. 82]. Following their conversation, Jackson went to the informant's house, alone. He was admitted to the

house by a woman and once inside met with Hughes. Hughes told Jackson he had a "good deal" for him for \$350.00 and showed him six multi-colored balloons filled with a brown powder. Jackson complained about the price again, to which Hughes replied, "Well, you take this and I am going to give you a good deal the next time, so when I come back from Mexico I will get in touch with you and I will give you a real good deal." Jackson gave Hughes \$350.00 and left [R. 83].

On April 20, 1967, Jackson returned to the informant's residence. Upon entering he met Hughes, who took him to a bathroom and closed the door. Hughes then removed a rubber condom from his pants pocket containing a tan powder and said, "Here is the stuff" [R. 86]. Jackson asked him how much he wanted for it, to which Hughes replied, "One hundred seventy-five dollars. I promised you a deal when I came back from Mexico, this is the best deal I can give you." Jackson gave Hughes \$175.00 and left [R. 87].

The tan powder substance purchased by Jackson from Hughes on the afore related three occasions was identified as heroin by an expert chemist [R. 132-149].

Because of the nature of Hughes' allegations of error in this appeal we recite for the Court's benefit the evidence presented by the defense.

Hughes testified in his own behalf. His substantive testimony of his defense was prefaced by his admissions that he had been convicted of felony burglary [R. 163], shoplifting,

petty theft (he stole a watch from a police officer) [R. 164], and had been arrested some 35 times for being drunk and disorderly [R. 165].

Hughes testified he had known the informant since 1952 [R. 165]. He stated that the informant lived with some prostitutes at the residence where the instant transactions took place [R. 168]. Hughes said he was picked up at his hotel (on skid row [R. 303]) by the informant on April 5, 1967 and told by the informant to give a package of dope to Agent Jackson [R. 170-171]. He gave the package to Jackson who gave him some money which he in turn gave to the informant [R. 171-172]. Hughes testified he executed this transaction at the informant's request because he thought he was going to get \$.50 or \$.65 for a drink or a bottle of wine [R. 172-173]. Hughes stated he drank 3 or 4 quarts of wine a day [R. 173]. He said the informant told him, on April 5, to put the dope in his mouth [R. 173-174].

Hughes admitted talking to Jackson on the phone prior to the transaction on April 5, saying that the informant was present with him during the conversation and told him what to say to Jackson [R. 175]. The phone call to Jackson was made from the informant's house [R. 176].

In Hughes' remaining testimony [R. 179-191] he admitted to the transactions on April 10 and 20 stating that on each occasion he was transported to the informant's house by the informant or one of his girls, that on each occasion the informant gave him the dope to give to Jackson and that he in turn gave all the money he

received to the informant. He admitted saying everything Jackson attributed to him in the course of the three buys, explaining that the informant had told him what to say.

It was established that in December, 1966 or January 1967, the informant was arrested for selling narcotics [R. 209; 211] and, at the time of this trial, federal proceedings were pending against him [R. 211].

The informant testified and denied everything the Appellant had said about his complicity in the sales [R. 207-224].

GOVERNMENT'S COUNTER ARGUMENT NUMBER ONE

(RELATIVE TO APPELLANT'S SPECIFICATION
OF ERROR 1)

DIMINISHED CAPACITY IS NOT A DEFENSE
TO A CRIMINAL CHARGE IN THE NINTH
CIRCUIT JUDICIAL DISTRICT.

STATEMENT

Hughes' contention in this specification of error is that the trial court denied him the right to present a defense - the defense of diminished capacity to formulate the requisite criminal intent [Appellant's Br. 4-8]. The trial court refused to permit Hughes to offer proof that " . . . the defendant is a person of impaired intelligence, he is alcohol motivated, he in Dr. Drury's

opinion probably has brain damage, that he is a person highly susceptible to suggestion, that his judgment as a reasonable man is severely impaired and that as a result of these findings the material proof as to his knowingly acting in violation of the laws of the United States should be considered" [R. 158]. The Court sustained the Government's objection to the offer of proof [R. 159-160] stating:

"If that is the case then he would be incompetent at the time of the offense. Otherwise this is not material at all. If a man is not capable of knowing what he is doing, then he is incompetent" [R. 158].

The Court had, prior to trial, found Hughes competent to stand trial following a psychiatric examination [T. 16].

ARGUMENT

The District Court properly denied the offer of proof. Although the Court spoke in terms of "competency at the time of the act" ^{1/} in denying the offer of proof it is clear that the Court was speaking in terms of mental "responsibility" at the time of

^{1/} The question of a defendant's mental competency is relevant only to his mental ability at the time of trial. "[T]he 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him.' " Dusky v. United States, 1960, 362 U.S. 402, 4 L. Ed. 2d 824, 80 S. Ct. 788.

the act. The question of the defendant's competency was not in issue, it having been theretofore determined by the Court that the defendant was competent to stand trial. When the Court stated "If a man is not capable of knowing what he is doing, then he is incompetent," the Court was clearly speaking in terms of mental irresponsibility for the commission of crime. The only defense available to an accused in this Circuit which relates to such irresponsibility is the M'Naghton defense. Sauer v. United States, 9 Cir. 1957, 241 F.2d 640, cert. denied, 354 U.S. 940. No defense of mental irresponsibility less than that of the M'Naghton test, such as diminished capacity, may be relied upon. Ramer v. United States, 9 Cir. 1968, 390 F.2d 564. The Court therefore properly rejected the proffered defense because in defense counsel's own words it did not nor did it purport to measure up to the M'Naghton standard.

Furthermore, to argue, as does Hughes, that evidence of diminished capacity should be admitted as bearing on the intent with which he acted is to argue the inapposite. Even under the California state law of diminished capacity, the defense is but a partial defense available only to a defendant charged with a crime in which the state of mind with which he acted is determinative of the degree of the offense committed. See Brubaker v. Dickson, 9 Cir. 1962, 310 F.2d 30, reviewing California law on diminished capacity. The only intent for which the defendant herein was held charged was "the doing of an act which the law forbids intending with evil motive or bad purpose to disobey or to disregard the law"

[R. 263]. There are no greater or lesser degrees of intent involved in the instant offense. Thus, had the proffered testimony been received and believed by the jury, acquittal could have followed based on criminal irresponsibility of a standard less than M'Naghton for there was no lesser degree of the crime charged relative to a lesser intent. This would have clearly violated the holdings of Sauer and Ramer.

Furthermore, following the denial of the offer of proof, Hughes took the stand and admitted all the elements of the offense, including knowledge of the narcotic content of the packages sold to Jackson [R. 170-171].

We submit that under the circumstances there was no error.

GOVERNMENT'S COUNTER ARGUMENT NUMBER TWO

(RELATIVE TO APPELLANT'S SPECIFICATION OF ERROR II)

HUGHES WAS NOT PREJUDICED BY THE COURT'S REFUSAL TO PERMIT HIM TO INTERROGATE THE NARCOTIC AGENT AS TO THE INFORMANT'S MOTIVE FOR THE REASON THAT THE QUESTION POSED TO THE AGENT WAS THEREAFTER ASKED OF AND ANSWERED BY THE INFORMANT HIMSELF.

STATEMENT

Hughes claims prejudice because the trial court would not permit him to ask the narcotic agent if the federal narcotics case against the informant for selling narcotics was still pending or if it had been disposed of [R. 92-93]. He asserts that his right to show the informant's motive relative to his claimed entrapment was thereby infringed.

However, the informant did testify and on direct examination by defense counsel the following took place:

Q. "As a result of that arrest, have proceedings been lodged against you in any court of the State of California or Central District of California?

A. "I don't quite understand you. . . .

Q. "Is there any proceeding pending against you?

A. "Yes, there is.

- Q. "In the State or where?
A. "Here in California.
Q. "A federal court or a state court?
A. "Federal court, up here in this building"
[R. 210-211].

ARGUMENT

The answer sought by Hughes from the agent was completely answered by the informant himself and therefore Hughes is in no position to claim prejudice.

GOVERNMENT'S COUNTER ARGUMENT NUMBER THREE (RELATIVE TO APPELLANT'S SPECIFICATION OF ERROR III)

THE GIVING OF THE ENTRAPMENT INSTRUCTIONS
STUCK DOWN IN NOTARO v. UNITED STATES IS
NOT PREJUDICIAL ERROR IN THE ABSENCE OF
AN OBJECTION ON BEHALF OF THE DEFENDANT.

STATEMENT

The trial court instructed the jury on entrapment [R. 275-277]. This was the same instruction struck down by this Court in Notaro v. United States, 9 Cir. 1966, 363 F.2d 169. The defendant at no point objected to the giving of that instruction.

ARGUMENT

The failure to object to the giving of the Notaro instruction does not give rise to "plain error" under Rule 52(b), F. R. Cr. P., 18 U S. C., where the issue of entrapment is not a close question. Smith v. United States, 9 Cir. 1968, 390 F.2d 401; cf. Nordeste v. United States, 9 Cir. 1968, 393 F.2d 335, 339-340; Robison v. United States, 9 Cir. 1967, 379 F.2d 338, 345. Even assuming the truthfulness of Hughes' testimony at trial, the question of entrapment is not a close one. The very readiness and ease with which the Hughes agreed to commit the offenses herein is most sufficient to warrant rejection of his claim of entrapment. United States v. Sherman, 2 Cir. 1952, 200 F.2d 880 882.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction should be in all things affirmed.

Respectfully submitted,

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IN THE
United States Court of Appeals
For the Ninth Circuit

TRUCKING, UNLIMITED, et al.,	}	<i>Appellants,</i>
vs.		
CALIFORNIA MOTOR TRANSPORT Co.,	}	<i>Appellees.</i>
et al.,		

On Appeal from the United States District Court
for the Northern District of California

REPLY BRIEF FOR APPELLANTS

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**On Appeal from the United States District Court
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REPLY BRIEF FOR APPELLANTS

SUMMARY OF ARGUMENT

The present issue before the court is to determine whether plaintiffs' complaint states a cause of action. It is, therefore, necessary first to understand the allegations of the complaint. In large measure the allegations speak for themselves. Nevertheless, defendants have misconstrued the complaint in contending that it charges them with combining and acting primarily to influence public officials. (Ap'ees Br. 31.) This case does not present the question whether a combination of competitors to change public policy through a program of litigation may be immune from

the antitrust laws. Rather, plaintiffs have alleged facts which raise two principal points of law:

I. Misuse of Judicial Process.

Plaintiffs contend that defendants have violated the Sherman Act by instituting a program of litigation in the agencies and courts using their judicial processes—not their law-making processes—primarily in order to eliminate the individual private business rights of competitors—not to change law or public policy, or to effect other legitimate objectives. Plaintiffs thus contend that:

(A) Whether defendants' activities are found to be "political" or "non-political," if their objectives have been sought through the use of judicial processes, the use of such processes is permissible only if the objectives themselves are legitimate, as they were in *NAACP v. Button*. Where petitioning of executive and legislative agencies is involved, otherwise illegal objectives such as harassment or the impairment of competition may be sought, as in *Noerr*. But where harassment or the impairment of competition is sought through the use of *judicial* processes, the illegality of the objective is relevant in determining the illegality of the process used. Use of judicial process to accomplish illegal objectives constitutes, as a matter of law, an illegal "misuse" of judicial process.

(B) Even if it can be said, however, that *Button* applies *Noerr* protection—that is, regardless of intent to accomplish illegal objectives—to some forms of

judicial petitioning, such protection would extend only to the resolution of "political" issues. Under defendants' own analysis of *Noerr*, *Pennington* and *Button*, protection of conspiratorial activities which otherwise would be in violation of the anti-trust laws (or any other laws) is available only where such activity takes the form of "political" petitioning as defined in those cases. Defendants' activities were not political expressions and therefore cannot be protected even under defendants' own view of those cases.

II. Sham Attempts to Influence Government.

Even if it is found as a matter of law that attempts to harass and restrain competition through judicial processes might be considered "political" activity within the protections afforded by *Noerr*, in fact defendants' activities in this case show them to be "sham." The primary purpose and actual effect of defendants' actions were not to attempt genuinely to influence government, but to prevent competitors from having access to operating rights controlled by government agencies. Any attempts to influence government decisions on plaintiffs' applications for rights were incidental to defendants' attempts directly to restrain plaintiffs from applying for such rights.

- I. A USE OF THE JUDICIAL PROCESSES OF THE COMMISSIONS AND COURTS FOR THE PURPOSES OF ELIMINATING PRIVATE BUSINESS RIGHTS OF COMPETITORS IS NOT WITHIN THE PROTECTION OF NOERR, AND IS SUBJECT TO THE SHERMAN ACT.
- A. Misuse of Courts Is Not Shielded by the Right of Petition Even Where the Activities Involved May Be Characterized As Political.

The constitutional guaranty of the right of assembly and petition protects group access to courts, *United Mine Workers of Am. v. Illinois State Bar*, 389 U.S. 217 (1967), *Bhd. of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964), *NAACP v. Button*, 371 U.S. 415 (1963) as well as access to the legislative and executive branches, *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961). It is well established, however, that access to legislative and executive agencies in order to inform government officials is practically unfettered, while access to courts and the uses to which courts may be put to achieve private ends is not nearly so free from restraint. Plaintiffs have pointed out in their opening brief that application of the guaranty of the right of petition is applied differently to courts, on the one hand, and the legislative and executive branches of government, on the other. (Ap'tants Br. pp. 59-65.) As plaintiffs have pointed out, the ability of the courts to police misuses of judicial forums is well established, while their ability to police the political processes of the legislative and executive branches is contrary to the constitutional concept of a separation of powers. Thus, in the present case, as in the patent-antitrust cases, where the medium for an attempted

conspiratorial restraint is the judicial processes of the courts and commissions, many of the reasons for the courts' hesitancy to apply the Sherman Act in *Noerr* and *Pennington* simply do not apply. Plaintiffs have also cited examples of this principle of limited access to judicial processes for illegitimate purposes, e.g., malicious prosecution, abuse of process, contempt, harassment through judicial action, and patent litigation for anti-competitive purposes. These principles cannot be seriously contested. Plaintiffs therefore contend that where the judicial processes of the courts and commissions are used for purposes of harassment or antitrust restraint, the processes are in fact "misused" and are not protected by *Noerr* or other authority from any of the penalties attaching to such misuse—antitrust, malicious prosecution, or whatever.

Although defendants do not deny that they have used the judicial processes of the commissions and courts in this case, they contend that they have used them for political purposes—to influence policy-making decisions akin to legislatively made law—in the same manner that they might have influenced the legislature itself within the protections of *Noerr*. In support of this proposition they rely heavily on *NAACP v. Button*, 371 U.S. 415 (1963). They argue that *Button* disposes of plaintiffs' case because *Button* protected a group use of judicial machinery for political purposes, and therefore it is irrelevant whether defendants' activities before the commissions and courts were "judicial," "executive," or "legislative."

Noerr, Pennington, and *Button*, they contend, protect all forms of conspiratorial petitioning for any purpose, including harassment and restraint of competition.

In citing *Button* for the argument that their activity was supposedly political in nature, the defendants have failed to address themselves to a basic question which must be answered before any discussion of the "political" or "non-political" nature of their activities becomes relevant. That question is whether or not defendants have used judicial processes in order to accomplish unlawful objectives. In *Button* the Supreme Court found that the litigation by the NAACP was, as defendants stress, "not a technique of resolving private differences," but "a form of political expression." (371 U.S. at 429.) But equally important, the court found that the litigation in that case was "a means of achieving *lawful objectives*," a factor nowhere discussed in defendants' brief. (371 U.S. at 429.) The court found that the NAACP and members of the Negro community in this country had been denied the more orthodox means of political expression, such as voting, and that "under the conditions of modern government, litigation may well be the sole practical avenue open to a minority to petition for redress of grievances." (371 U.S. at 430.) The court cited *Noerr* not for the proposition that judicial processes might be used regardless of intent or purpose, but merely for the general proposition that the First and Fourteenth Amendments "protect certain forms of orderly group activity." (371 U.S. at 430.)

Thus, there are three salient features present in *Button* which distinguish it from the present case: First, the court emphasized the legitimacy of the NAACP's intent and purpose, and the lawfulness of their objectives. Unlike the present case, and unlike *Noerr* and *Pennington*, the NAACP's petitioning did not intentionally or actually harass their adversaries or restrict them from a similar petitioning of the courts resulting in a restraint of trade or any similar illegal objective. Second, the combination seeking to use judicial processes did so for what were clearly found to be a means of *political* expression. Third, the court made it clear that as a method of redressing grievances, the NAACP had no alternative to the litigation employed.

It is clear, then, that *Button* does not protect petitioning through the judiciary for any purpose whatsoever. Not only was the objective sought in that case legitimate, but the Court stated that judicial petitioning to harass or accomplish other unworthy or illegal objectives is not protected by the First Amendment.

“Malicious intent was of the essence of the common law offenses of fomenting or stirring up litigation. * * * Hostility still exists to stirring up private litigation where it promotes *the use of legal machinery to oppress*: As, for example, to sow discord in a family; to expose infirmities in land titles, as by hunting up claims of adverse possession; to *harass large companies through a multiplicity of small claims*; or to oppress debtors as by seeking out unsatisfied judgments. For a member of the bar to participate, directly or through intermediaries, in such misuses of the

legal process is conduct traditionally condemned as injurious to the public.” (371 U.S. at 440. Emphasis added.)

The case confirms that where judicial petitioning is involved, the motives and intent behind the petitioners’ litigation are relevant in determining the legality of the litigation employed.

The Supreme Court in *United Mine Workers of Am. v. Illinois Bar Assoc.*, 389 U.S. 217 (1967) further confirmed this principle. In that case the question presented was whether the Union might employ a licensed attorney on a salaried basis to represent any of its members who wished his services to prosecute workmen’s compensation claims before the Illinois Industrial Commission. The Illinois State Bar Canons of Professional Ethics forbade such a practice, and the Illinois Supreme Court, in supervising such practices, affirmed an injunction against it.

The Supreme Court reversed the State court on the grounds that such access to the judiciary was protected by freedom of speech and the right to petition under the First and Fourteenth Amendments. In so doing, the entire thrust of the Court’s opinion was to inquire into the legitimacy of the objectives sought to be served through the Union’s proposed use of judicial processes.¹ The Court balanced the evils which might flow from permitting such a scheme with the legitimate objectives that might be served, and concluded that the latter outweighed the former. (389

¹The court also noted that the right to petition applied to “private” as well as “political” causes, a point which is discussed in Part B below (see p. 13).

U.S. at 219-223.) If illegitimate objectives had been found to be the purpose or result of the Union's plan in that case, the Court would not have extended First Amendment rights to the judicial petitioning proposed. On this point, even the dissent was in agreement.²

The first question, therefore, is not to determine whether defendants' activities were "political" or "non-political" expressions, but whether defendants used judicial processes in order to achieve illegitimate objectives. Plaintiffs have set forth in detail in the complaint and their opening brief facts which establish conclusively that the purpose and the actual result of defendants' plan was to suppress and eliminate competition. This objective standing alone is clearly illegitimate and in violation of the antitrust laws. Plaintiffs have also pointed out in their opening brief that the processes employed by defendants in achieving their antitrust aims were judicial rather than legislative or executive. The existence of these two factors—the use of judicial processes to achieve an

²In dissenting, Justice Harlan stated as follows:

"Although I agree with the balancing approach employed by the majority, I find that the scales tip differently. * * * The plan [of the Union] is evidently designed to help injured union members in three ways: (1) by assuring that they will have knowledge of and access to an attorney capable of handling their claim; (2) by guaranteeing that they will not be charged excessive legal fees; and (3) by protecting them from crippling, even though reasonable, fees by making legal costs payable collectively through union dues. *These are legitimate and laudable goals.* However, the union plan is by no means necessary for their achievement." (389 U.S. at 228.)

Justice Harlan went on to dissent on the grounds that although the goals sought were legitimate, they might have been realized within the framework of existing State law.

illegal objective—distinguishes this case from the narrow antitrust exemption provided in *Noerr*.

Defendants contend that if a method of influencing public officials can be shown to be political in nature, it no longer matters whether those officials are executive, legislative, or judicial. The argument misses vital distinctions between the dispute-resolving functions of these different government agencies. Litigation—whether it concerns certificates of public convenience and necessity, patents, workmen's compensation, personal injuries or property damages—is nonetheless litigation involving judicial processes between private parties. Such determinations are made through the adjudicative procedures unique to courts. Litigation is conducted on a case and controversy method of resolving private disputes even where broad policy questions affecting others than the litigants are involved. If competitors choose the courts to achieve anti-competitive purposes, then they are bound by the rules—constitutional, statutory and common law—which control their conduct before courts. Even in *Button*, where the NAACP's activity was found to be political expression through judicial processes, it is apparent that the rules controlling and limiting the uses of courts were not violated inasmuch as the courts were not used to accomplish any unlawful aims.

None of the three major branches of government may be unreasonably closed to petitioners who seek redress of grievances. Nevertheless, recognition has always been given to the varying methods of opera-

tion characterizing courts, legislatures, and executive offices. The procedures for expressing one's views vary greatly in each of these branches of government. No person may abuse the processes of the governmental agency he seeks to influence—whether his expression is political or not—and still claim constitutional protection. The legislative and executive branches have standards under which they may be lobbied. Acts requiring registration of lobbyists, rules against bribery or undue influence, and regulations governing time, place and manner are examples of such control. Such standards, to be sure, leave the channels of communication largely unfettered between elected officials and their constituents. However, the criteria governing modes of expression in courts are considerably different. Since litigation is conducted on a case and controversy basis, no judge may be lobbied in a litigated dispute. The processes of the courts may not be deliberately activated or interfered with in order to achieve an anti-competitive result. They may not be used to vent one's malice upon another. Thus, the intent and purpose of a party in using the courts may be ascertained in order to determine if the courts have been misused for an unlawful purpose. The courts have traditionally protected their processes against such misuse and the cases clearly support this concept. Indeed, plaintiffs know of no case which has held that judicial processes may be lawfully used to accomplish an unlawful objective—whether the objective is wrapped up with political considerations or not.

B. Defendants' Activities Were Not a Form of Political Expression and Hence Are Not Within the Protection of Noerr or Button.

Assuming for the moment, as defendants argue, that *Button* protects petitioning through judicial processes regardless of one's intent or purpose to accomplish illegal goals, it is undisputed that such petitioning is permitted only if the petitioning process or the goals sought are found to be "political." The political nature of the petitioning process, so the argument goes, is of paramount value in comparison to other values such as the antitrust laws whose application, if permitted, would illegalize the petitioners' activity and thus hamper the political process upon which political decisions are made.

Where petitioning involves the resolution of non-political disputes, however, the law applies the same standards to litigation as are applied to judicial petitioning generally, as discussed in plaintiffs' opening brief and in Part A above. That is, where the petitioning process does not involve the resolution of political questions, there are not even arguable grounds for safeguarding the process to the extent of disregarding the illegal objectives sought, as they were in *Noerr*. Where petitioning is not political in nature, intent, motive and objective are therefore relevant in judging the legality of the conspiracy and the petitioning methods it uses.³

³Plaintiffs repeat that this discussion is made *arguendo* only. As stated in Part A above, plaintiffs believe that even if political disputes are sought to be resolved, if they are coupled with an illegal or illegitimate objective, and sought to be achieved through judicial as opposed to other processes, the illegality of the objectives sought serve to deny protection to the methods used.

This is not to say that all non-political petitioning is denied First Amendment protection. As the court in *United Mine Workers of Am. v. Illinois State Bar Assoc.*, 389 U.S. 217 (1967) pointed out, it is not necessary to espouse a political issue or attempt to resolve an issue through political channels in order to obtain First Amendment protections generally. But as *Button* also points out, and as *Illinois Bar* implicitly recognizes, where private objectives are sought to be served through the *judicial* petitioning process, the intended objectives of the petitioner are relevant to determine whether his activities are protected.

Assuming, then, that the degree of protection afforded political petitioning is arguably greater than that afforded private or non-political petitioning, it is necessary to decide whether the defendants' program of litigation in this case is "political" or not. Plaintiffs believe that defendants' activity was not political in nature, and that the individual plaintiffs' applications for carrier rights involved essentially a contest among carriers for private business rights, similar to the private business rights disputed in the patent-antitrust cases.

Defendants, on the other hand, argue that "public convenience and necessity" standards by which individual applications are adjudicated are so broad, and so greatly involve the making of public policy similar to law made by the legislature, that it is fair to call commission procedures and court review of them "political expression." They dismiss the patent-antitrust cases, where conspiratorial litigation for pur-

poses of restraining competition has been held to be an antitrust violation, on the grounds that these cases involve the settling of purely private disputes, while the present case involves the settling of rules, regulations, and “public policy” in a manner supposedly political—and thus *Noerr* protected—rather than private in nature.

Defendants, we believe, are totally unconvincing in contending that the patent-antitrust cases are not indications that the carrier rights in this case are essentially private, and that their dispensation is made through a process essentially non-political. The certificate and transfer proceedings involved in the present case are as much a resolution of disputes over private rights as are those in the patent-antitrust cases. Each involves the granting or denying of an individual’s business rights, even though each also has an effect upon the public interest. At the same time, it is difficult, if not impossible, to draw a factual parallel between litigation over certificates and transfers on the one hand, and the lobbying found in *Noerr* and *Pennington*, or the litigation found in *Button*, on the other. Defendants do not even attempt to draw such parallels.

Defendants attach significance to the fact that a certificate is revocable and that one may overlap another. On the other hand, their differentiation continues, a patent is a property right, may be bought, sold or traded, and, once granted, is exclusive and non-revocable. Defendants fail to explain why such different characteristics of systems of regulation

should require litigation involving one of them to be deemed political. Patents, though not revocable as such, may be held invalid after their grant, may be held unenforceable, may be subject to compulsory licensing in the name of public policy promulgated after letters have issued, and may be cancelled for abusive use. The courts have fashioned rules regulating patents which far exceed specific statutory or constitutional language. The courts have used wide and indeed effective discretion in the making of such rules. Yet, to say that litigation respecting patents is political activity of the type protected in *Noerr* is beyond reason. The cases involving patent litigation have clearly directed otherwise. The system of patents results from constitutional and statutory provisions rooted in a strong public policy which encourages invention. Public policy also pervades the granting of carrier certificates and litigation concerning them.

The involvement of public concern and policy-making in private litigation does not convert such litigation into political expression. Defendants have cited no authority to support the proposition that proceedings concerning a private trucker's application for rights is political activity. They argue that because the standards applied by the commissions to certificate proceedings are derived from the legislature, and the legislature acts primarily as a political body, it follows that the commissions act primarily as political bodies as well. The argument has little meaning, however, when one recognizes that even the adjudication of purely private disputes is undertaken

in light of legislatively derived standards. The courts in the patent-antitrust cases were concerned with applying legal standards and policy which the framers of the Constitution and legislators in their political wisdom required the courts to apply. Defendants have based their argument upon the unsupportable hypothesis that the adjudication of certificate disputes has a greater impact on the public than the adjudication of a patent infringement or misuse dispute.

Defendants also seem to argue that it is the quantity of discretion which a judicial body exercises in resolving a dispute which determines whether the resolution is political or private in nature. (Ap'ees Br. pp. 11, 27-28.) But that too is a bare assertion unsupported by analogy or authority. If discretion were the test, all antitrust litigation would be "political" and *Noerr* protected, for nowhere has Congress delegated greater discretion than it has in delegating to the courts the responsibility for resolving private disputes under the Sherman Act. Antitrust suits, certificate proceedings and patent litigation, like all other adjudications of private interests, have some effect on public policy. Yet, to recognize this fact does not transform private disputes into political activities.

In the present case, the disposition of certificate and transfer applications requires the resolution of private disputes. Public policy of "convenience and necessity" is involved in that it guides a resolution of the disputes, and in turn is defined by the results.

These public policy standards are subject to change through political influence. Defendants have never been precluded from attempting to change regulatory laws or policy through political influence or lobbying. If defendants in the present case had wished to alter the standards governing the granting of carrier rights, they had avenues of redress available to them other than to combine in adversary proceedings before the commissions and courts. If the defendants had truly wished to take advantage of *Noerr* protection, they might have lobbied the commissions and legislative and executive branches and attempted through this process, as in *Noerr*, to change the law governing the disposition of private carrier rights. While they would retain the right to protest applications in certificate proceedings, once the parties have reached such proceedings, defendants would be, as in the patent-antitrust cases, permitted only to protest for the purpose of defeating the applications at hand and thus attempting to influence public policy. Where their protests in what are essentially the resolutions of private rights take the form of a conspiracy not simply to defeat applications or enjoin patent infringements, but to use such opportunities for purposes of restraining trade, such activities are not immune to the antitrust laws.

It is this fact that regulatory agencies and courts provide adjudicative functions which distinguishes the present case from *Noerr*, *Pennington*, and related authority. In *Noerr* and *Pennington* the only issues involved were the influencing of legislative lawmaking

or executive policy-making. There were no issues, as in the present case, of attempting to use the adjudicative processes as a means of restraining competition. For that reason *Noerr* does not even address itself to the issues of resolving private requests or disputes presented in the patent-antitrust cases or the case at bar.

If the present case did not involve a misuse of commission adjudicatory machinery and court judicial procedures, but involved only an attempt to influence the commissions or legislatures through political activity, plaintiffs would have no legally sustainable complaint. If, for instance, defendants had conspired to use their joint resources to eliminate competition by lobbying the commissions and legislatures to alter their policy of granting rights to competitors, defendants would fall within the protections of *Noerr*, and despite a lack of financial resources necessary to combat such a program, plaintiffs could not sustain a complaint against defendants' activities. The need to protect defendants' ability to petition the government and through the political process inform it of its wishes would, as in *Noerr*, force the courts to refrain from interfering with the political process through application of the antitrust laws to what would otherwise be clearly an illegal antitrust conspiracy. But defendants did not conduct their conspiracy along these lines. They sought to interfere with the judicial process involving the resolution of disputes over private rights, and in so doing they acted in a manner totally uninvolved in the facts or language of *Noerr*.

Plaintiffs believe it is clear as a matter of law that defendants did not engage in political activities, but interfered with a technique of resolving what are essentially private disputes over carrier rights. But even if this court does not find as a matter of law that defendants' activities were essentially non-political in nature, given the indisputable principle that a conspiracy must be engaged in political activity to obtain *Noerr* protection, it is at least a question of fact as to whether defendants were so engaged in this case.

Plaintiffs recognize that the commissions have a dual role—that of helping to make policy much as the legislature would, and having made it, that of applying it to individual applicants as the courts do. Plaintiffs also recognize that this dual role makes it possible for defendants at least to argue that the thrust of their activities was to “make law” through “political” activity. To draw this conclusion on the basis of the allegations, however, is impossible. If such a conclusion can be drawn at all (and plaintiffs believe that it cannot) it must be drawn only by a trier of fact.

The fact that defendants' scheme of litigation may have had some effect on the commissions' standards for granting certificates and transfers cannot in itself make defendants' activities political in nature. If the effect—no matter how great or small—which an adversary proceeding has upon the standards of law applied were to determine whether the proceedings were truly “politi-

cal" or not, as plaintiffs have pointed out, virtually *all* judicial proceedings would be "political" since virtually all such proceedings have at least some effect upon the development of law. To permit that conclusion would be to deny the Supreme Court's distinction between litigation for political as opposed to private purposes, as set forth in *Button* and *Illinois State Bar*. It would also be to deny that the sole activity involved in *Noerr* and *Pennington* was a political petitioning of the legislature and executive, without any adversary proceedings whatsoever. And it would be to deny the existence and validity of the patent-antitrust cases where combinations to restrain trade through the use of judicial machinery—even where probable cause for the patent infringement actions was admittedly present—are not "political", and not protected by *Noerr*, but subject to the Sherman Act.

Considering that patent litigation is private litigation, that personal injury and workmen's compensation litigation are considered private litigation (see *Illinois State Bar*), and that malicious prosecution and abuse of process litigation are equally non-political, it is difficult to conclude that private disputes concerning certificates of public convenience and necessity should be classified as political activity. The lack of essential similarity between the certificate litigation involved here and the Civil rights litigation of *Button* is obvious. Certificate litigation, as well as the others mentioned above, are techniques of resolving private differences. In *Button* the court held that the litigation in question was truly not such a

technique but a form of political expression. Defendants have been foreclosed from no political institution. The fact that their trucking operations under certificates may further the National Transportation Policy is no more significant than the grant or denial of a patent furthering and implementing the important policy of the encouragement of inventions.

II. DEFENDANTS' ACTIONS WERE NOT UNDERTAKEN PRIMARILY TO INFLUENCE GOVERNMENT AGENCIES, BUT TO OBSTRUCT OTHERS FROM ACCESS TO THEM. AS SUCH, DEFENDANTS' ACTIONS WERE A SHAM USE OF GOVERNMENTAL PROCESSES, AS DEFINED BY NOERR, AND SUBJECT TO THE SHERMAN ACT.

Plaintiffs have alleged in Paragraph 8 of the complaint (R. 5-13) that defendants' plan and implementation of it were aimed directly at competitors and not the agencies; that to influence the agencies and the courts was not what defendants principally sought to do; that the result of defendants' combination was to force competing truckers to refrain from filing any applications, and as to those who filed to force them to abandon or compromise their applications through settlements. Defendants have purported to deal with that part of the *Noerr* decision which withholds antitrust immunity for "sham" conduct (Ap'ees Br., pp. 39-43), but their presentation is not persuasive because they have erroneously assumed that plaintiffs charge them with combining to change the policy of the agencies through a system of litigation. As stated before, the complaint alleges otherwise.

As plaintiffs pointed out in their opening brief (Ap'ants Br., 65-73), questions of whether or not defendants' activities were "political" within the meaning of *Noerr* are immaterial if defendants have not restrained trade through government decisions or genuine efforts to obtain them. There is no dispute over this principle. Defendants recognize that not all combinations which result in a restraint of trade are *Noerr*-protected simply because their restraint involves some form of government procedure. It is necessary to determine precisely *how* government is involved, and *how* its processes are used. Where a government agency is genuinely petitioned and a restraint is the product of a government decision or the genuine attempts to influence a decision, then—but only then—the combination is not subject to the Sherman Act even if its members' actual motives were to restrain competition. The need to protect the flow of information necessary for the government to act in its "representative capacity" depends upon leaving unfettered the channels through which those who are governed may petition or communicate with those who govern. The court in *Noerr* recognized that these values outweigh the values of declaring illegal combinations which restrain trade through a genuine use of governmental processes. Undesirable as such combinations are, to illegitimize their activity in order to protect the trade of their target competitors would have the dangerous side effect of impairing the government's ability to govern on the basis of the fullest possible knowledge of what is at stake. Thus, even

where the intent and the effect of the conspiracy are clearly to damage its competitors, where they are effected through a genuine petitioning of government, such petitioning vitiates the otherwise illegal restraint, at least for antitrust purposes.

Where a conspiracy to restrain trade does not in fact use governmental processes to obtain government action, however, the values inherent in protecting an exchange of information and access to government are not present, and the need to forego an examination of the conspiracy's intent and methods of restraint does not arise. Where governmental processes are not used in a genuine effort to influence government, a conspiracy to restrain trade is as subject to the antitrust laws as it normally is where there is no use of governmental processes at all. The Supreme Court recognized in *Noerr* that governmental processes might be involved in a restraint of trade only in appearance, and that such appearance should not serve to immunize the conspiracy from normal Sherman Act standards. (365 U.S. at 144.)

Given this distinction between genuine and sham attempts to influence government, it remains only to be applied to the allegations in the present case. Defendants contend that their actions and purpose were primarily to influence governmental agencies to deny plaintiffs' applications or otherwise to rule in favor of defendants, and that the time, money and effort necessary merely to confront defendants' conspiracy were nothing more than incidental to their allegedly gen-

uine efforts to influence government, and thus only incidentally served to deter plaintiffs from access to governmental agencies.

Plaintiffs contend that defendants' activities and purpose were, on the contrary, directly to suppress and eliminate competition from plaintiffs and other potential competitors, not primarily by attempting to influence the commissions to deny applications, but by preventing plaintiffs and others from seeking carriage rights, and that in the course of doing so, the defendants incidentally influenced some government decisions against plaintiffs' interests. While defendants have not placed physical roadblocks in plaintiffs' path to the commissions and courts, they have created financial roadblocks of even greater deterrent effect.

Several elements of defendants' plan stand out in particular and support this interpretation. These elements are (1) defendants' publicity directed at competitors, not at the agencies or courts, announcing that every application would be protested and appealed to the fullest extent, and that huge sums of money were available to conduct the defendants' program; (2) the decision by defendants, made in advance of the filing of applications, to protest every application, non-selectively, without knowledge of its contents or merits; (3) the withdrawals of protests where applicants settled with defendants even though defendants now allege that they were attempting to influence the making of policy, which would call for pursuing a protest to its conclusion; and (4) protesting by defendant carriers who had no immediate

interest in the plaintiff's application at hand other than that it affected the interests of a co-conspirator.

These unique elements are not present in a plan which seeks to influence government in the manner done by the railroads in *Noerr* or the NAACP in *Button*. Inclusion of such factors in a legitimate plan to influence government, even though anti-competitive in nature, is difficult to imagine. If these and similar factors alleged by plaintiffs do not make out a "sham" cause of action, the sham exception to *Noerr* is virtually meaningless.

Inasmuch as establishing a barrier between plaintiffs and the commissions in part involved the protesting of applications coming before the commissions, defendants had the incidental opportunity of attempting to defeat some of those applications on the merits. As a result, defendant seize this point in their brief and attempt to argue that all of their actions represent nothing more than genuine efforts to defeat their potential competitor's applications by influencing commission decisions. They state that "There is no allegation that defendants did not genuinely try to influence the PUC, the ICC, and the courts" (Ap'ees Br., p. 40); that plaintiffs "admit in their pleadings that defendants were successful in persuading the agencies to deny some of plaintiffs' applications or to grant some only in part" (Ap'ees Br., p. 41); and that in appearing before the agencies and courts, plaintiffs admit that defendants "made the best case the facts would permit." (Ap'ees Br., p. 40.) Defendants attempt to conclude from these "admissions"

that the complaint charges them only with a restraint through their influence over the commissions and courts, and state that while a “sham exception” exists (Ap’ees Br., p. 40), plaintiffs “could not truthfully make the kind of assertions which would have accomplished that result.” (Ap’ees Br., p. 40.)

Defendants have misunderstood and misconstrued what is complained of in this case. The complaint alleges that defendants’ actions, not government decisions, were successful in stopping the filing of applications. (R. 11.) Their intent and activities were primarily to use government processes—not influence government officials—as a lesson to plaintiffs and others that attempts to obtain carriage rights would be economically futile. To the extent that applications reached the commissions, of course, there was no reason not to try to be successful on the merits, to make the best case the facts would allow, and genuinely to influence commission decisions. But this was an incidental feature of a plan whose objective, function and effect was primarily not to influence government officials, but to clog and encumber governmental processes, and thereby deter applicants even from reaching government officials.

Defendants implicitly recognize that the real damage done by their conspiracy resulted not from incidental attempts to influence government but from their clogging government processes and thereby preventing plaintiffs from seeking rights. That plaintiffs and other potential truckers have in fact been deterred by defendants’ conspiracy from filing appli-

cations has never been subject to dispute. The record on this matter speaks for itself. Plaintiffs and other truckers sought and obtained rights consistently until they were faced with the prohibitive costs in time and money resulting from defendants' joint agreement to file protests. It was defendants' conspiracy, implemented and publicized, which abruptly ended applications by plaintiffs and other competitors of defendants. No other conclusion is possible.

Defendants also recognize that it was the prohibitive costs of meeting their protests which made it impossible for truckers to prosecute new applications. They simply argue that there is cost inherent in any protest proceeding and that cost as a deterrent factor, therefore, cannot serve as evidence of a direct restraint or in any other way serve to illegitimize their protests. Defendants' argument simply misses all questions of factual variances which distinguish a genuine from a sham attempt to influence government. Plaintiffs recognize that there is expense incurred by applicants or litigants who must meet a protest or defense which they otherwise would not have to meet. They do not complain of that cost. Indeed, for years plaintiffs and other competitors were met with protests by individual companies which believed that their business interests would be adversely affected by the granting of the rights applied for. Sometimes the protests prevailed; sometimes they did not.

But as plaintiffs have alleged in the complaint and explained in their briefs, defendants' conspiracy de-

feated applications in a manner different both in kind and degree, and the characteristics which can be factually established were not those which can be found in combinations which seek only to influence government. It is clear, as plaintiffs have alleged, that the protests were made to prevent applicants even from "making their wishes known" to agencies and courts. As with all conspiracies, their individual power was transformed into immeasurably greater power merely through the accumulation and joint exertion of purpose and resources. Given these facts it is virtually meaningless to assert, as defendants do, that "any protest is apt to entail expense to applicants . . . but that is inherent in the common law system." (Ap'ees Br., p. 10.) "Any" protest certainly is not apt to entail the same kind or extent of expense to an applicant which defendants' combined protests entailed, and the power exercised by a conspiracy, whether through prohibitive financial expenses or otherwise, certainly is not "inherent" in our common law system, but generally condemned by it. If any common law principle applies, it is that the courts will tolerate the restraints of conspiracies only in the narrowest of circumstances, where the protection of countervailing values simply leaves no alternative. For this reason the Supreme Court in *Noerr* was careful to state that where the conditions for *Noerr* protection are not present—where the conspiracy is not shown *as a matter of fact* to effect its restraint through genuine efforts to obtain governmental decisions—the constitutional values of pro-

tecting governmental decision-making are absent and the direct restraint resulting from the conspiracy's activities are subject to the Sherman Act.

To permit defendants' incidental attempts to influence government to justify their blocking of plaintiffs' access to rights would be to permit the tail to wag the dog. If such were the case, a single genuine protest before a government agency would constitute a license to obstruct an unlimited number of applicants even from attempting to obtain regulated rights. This, we believe, neither *Noerr*, *Pennington*, *Button*, nor the Constitution will permit. The sham exception in *Noerr* itself prevents such a possibility. Whether defendants' activities in this case were essentially genuine or ostensible attempts to influence government are questions of degree and of evidence to be weighed by the trier of fact. As such, they are questions which are not presently before the court. The only questions before the court are (1) whether as a matter of law a trier of fact is permitted to find that defendants attempted to use government processes not in a genuine attempt to influence government decisions but in order directly to restrain competition, and (2) whether plaintiffs have alleged such to be the case here. The fact that a sham exception to *Noerr* exists as a matter of law is not subject to dispute. As for plaintiffs' allegations, we believe it is clear that plaintiffs have stated that the purpose and effect of defendants' conspiracy was to prevent competitors from acquiring rights by use of government *processes*, not by attempting to influence government decisions.

For this reason, plaintiffs reiterate that they have the right as a matter of law to prove to a jury that defendants' restraints were imposed not through attempts to influence the agencies and courts, but by interposing their conspiracy between plaintiffs and these forums.

In misconstruing the thrust of the allegations of the complaint, defendants have also misconstrued the relevancy of intent and purpose in this case. They cite language from *Pennington* which states that “*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose . . . joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.” (381 U.S. at 670; *Ap’ees Br.*, p. 16.) From this they argue that their intent is irrelevant in this action for all purposes. In so doing, they have begged the very question presented—namely, whether their action was primarily a genuine attempt to influence government officials, or was merely an apparent attempt in order to effect a plan of direct obstruction of competitors. It is clear from *Noerr* and *Pennington* that intent and purpose to restrain competition become irrelevant only if it is shown that there was in fact a genuine attempt to influence government officials. Once that is shown (and there were no allegations or issues to the contrary in those cases), the conspiracy’s ultimate intent becomes irrelevant. But the threshold question as to whether defendants’ conspiracy was genuine or sham must first be asked, and to answer this question it is relevant to

show not only that their actions, viewed objectively, constituted an ostensible use of government processes, but also that they *intended* their actions to be ostensible rather than genuine. If, for instance, plaintiffs could produce a letter authored by defendants stating that “In entering massive protests before the commissions, our intended objective is merely to deter further applications, not to influence commission decisions,” that stated intent would be relevant to a showing that defendants’ actions were in fact a sham rather than a genuine use of government. Plaintiffs do not possess a letter with these precise words, but do possess correspondence which implies such intent and will show through it and the testimony of witnesses, including members of the conspiracy itself, that the defendants’ purpose was in fact to obstruct access rather than influence government. If their activities are found to be primarily a genuine attempt to influence government, under *Pennington* their ultimate intent to damage plaintiffs is irrelevant. But if their activities are found to be primarily a mere ostensible attempt to influence government, to disguise their direct restraint of competition, the protections afforded by *Noerr* do not apply and defendants’ intent to damage plaintiffs is merely one factor among many in proving an antitrust violation.

Defendants’ attempt to characterize their activities as genuine within the meaning of *Noerr* misses other distinctions between *Noerr* and the present case as well. In *Noerr*, there was no allegation or even suggestion that the primary thrust of the defendants’ activities was other than to influence legislation. There

was some incidental direct restraint upon competitors, but the court made it clear that as a matter of degree, direct restraint was a small and inevitable part of the conspiracy's activities.⁴ Plaintiffs have alleged exactly the contrary in this case.

In *Pennington* and *Button* too, there were no allegations that any interested parties were restrained from access to the government officials involved. In fact, in *Button* the court found for the NAACP in order to *protect* a group's access to government and their right to make their wishes known—the very thing for which plaintiffs are seeking protection in this case.

The value of protecting plaintiffs' access to the PUC and ICC is nowhere better illustrated than in defendants' own brief. In arguing that the commissions must exercise great discretion in adjudicating applications for rights and transfers, defendants point out the need for regulatory agencies to act on the basis of a wide range of information from those affected by their decisions:

“While [the commission's] decisions may most immediately affect individual carriers, their decisions must necessarily be based upon the formulation of governmental policy which reaches a large segment of the economy. The question before an agency in a certificate case is, how will the public be affected if the number of competitors in the

⁴“It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed.” (365 U.S. at 143.)

market is increased. Will the service improve or deteriorate? Will costs, and therefore rates charged to the public, go up or down? In short, what economic policy, what degree of competition, will most benefit the shippers and receivers of freight? That question is "legislative" not in the sense that the Legislature, as constituted, can efficiently answer it, but in the fundamental sense that it is a policy making and law-making function, where the dialogue between the people and the administrators is as worthy of protection as any dialogue between the people and their legislators or executives." (Ap'ees Br., p. 35.)

The complaint alleges that it was the purpose of defendants' conspiracy to permit as few applications and as little information as possible from competitors to reach the agencies for their consideration. How is it possible, then, for the commissions and courts to answer these questions of public interest at all, much less accurately, if many of the businesses affected are precluded even from applying and thereby making essential information known? Defendants' argument cited above was made in order to support their contention that *they* must be protected in their efforts to influence the commissions even if the efforts take the form of a conspiracy against plaintiffs. Plaintiffs agree that defendants should be able to make their wishes known to governmental bodies involved even if their ultimate intent is to defeat plaintiffs' rights and thus eliminate competition. But defendants have done something more, and in so doing have gone beyond the narrow protections of *Noerr, Pennington*,

and other authorities cited by defendants. In conspiring to preclude all but themselves from access to the government, defendants have conspired to defeat the discretionary system which they espouse at great length in their brief; have conspired to defeat the constitutional values of exchange of information and the right to petition valued in *Noerr* and *Button*; and have conspired to defeat the individual rights of competitors to carry on their businesses free from the contrived restraints imposed upon them *not* by government decisions or the attempts of defendants to obtain them, but by a massive combination standing between plaintiffs and the governmental agencies involved.

Certainly not any form of government involvement can serve to cloak otherwise direct restraints with *Noerr* immunity. One of the premises of the sham exception is that some form of petitioning of government could be shown. Yet the court recognized that a question of fact remains as to whether this petitioning might be “ostensible” rather than “genuine.”

Even if one assumes, as defendants argue, that public officials involved in judicial determinations constitute “government officials” who might be genuinely petitioned by a conspiracy, nonetheless it is the *kind* of behavior and *degree* of restraint which determines whether defendants’ conspiracy was primarily a genuine effort to influence government, or was essentially a mock attempt to do so with the genuine effort primarily directed at deterring competitors from seeking rights. Only the trier of fact can answer these questions.

III. NONE OF THE CASES CITED BY DEFENDANTS SUPPORT THE CONCLUSION THAT THEIR ACTIVITIES IN THIS CASE ARE LEGITIMATE USES OF JUDICIAL PROCESS; ARE NOERR-PROTECTED "POLITICAL ACTIVITY" OR ARE PRIMARILY GENUINE EFFORTS TO INFLUENCE GOVERNMENT.

Plaintiffs have dealt with *Noerr*, *Pennington* and *Button* at length in the preceding arguments and in their opening brief. As for the other cases cited by defendants, none of them persuasively contradict plaintiffs' arguments.

In the first place, in none of the cases cited by defendants was there an allegation that the defendants incidentally or apparently attempted to influence public officials in order to effect a direct restraint of trade upon their competitors. As a result, none of defendants' authorities support their contention that their activities were primarily genuine attempts to influence government in the present case.

Second, in none of the cases cited by defendants (with the possible exception of *Bracken's*, considered below) did the court find that judicial processes could be used in order to restrain trade or accomplish other illegal objectives.

As a result, the additional authorities cited by defendants are not even arguably in support of their position unless the cases reveal that judicial processes were used for protected "political" activity, as in *Noerr*. In none of the cases cited are these conditions present.

(a) In *Citizen's Wholesale Supply Co. v. Snyder*, 201 Fed. 907 (3d Cir. 1913) the plaintiff supply com-

pany had in a separate action been convicted of violating a municipal ordinance prohibiting door-to-door retail sales of goods and wares. The United States Supreme Court reversed on appeal, and the plaintiff brought the instant antitrust action contending that defendants Snyder and others had induced the police to prosecute under the ordinance as a means of restraining plaintiff's trade.

Unlike the present case, defendants did not themselves use judicial processes against the plaintiff but sought only to influence the police—an executive agency—to bring a court action against plaintiff. Such lobbying would today probably fall within the protections of *Noerr*, and is materially different from the allegations of direct judicial misuse presented in this case.

In addition, the Circuit Court held that the defendants had merely sought in good faith to test the constitutional validity of the municipal ordinance. There was no finding by the trial court or Circuit court that the defendants had coupled this testing of the law with an illegal intent or purpose to restrain plaintiff's trade, as is alleged in the present case. On the contrary, the Court found that "No evidence was offered [by plaintiff] to show impairment of the supply company's trade. . . ." (201 Fed. at 909.)

(b) *Washington Brewers Institute v. U.S.*, 137 F. 2d 964 (9th Cir. 1943) is not even remotely analogous to the present case. On the contrary, the court held that the Sherman Act *did* apply to the combination of brewers who were charged with price-fixing

in violation of the antitrust laws. The defendant brewers, similar to the defendants in the present case, contended that governmental regulation of the industry conflicted with the Sherman Act and thereby immunized them from its application. The court rejected this interpretation conclusively.

Incidental to this finding, the court stated purely as dictum that it knew of no reason why brewers might not “jointly advocate state legislation . . . nor . . . aid the authorities in the policing of any legislation” adopted by the state. (137 F.2d at 968.) The court did not decide that issue, nor did it even suggest what *forms* of “advocating and policing” of legislation would be protected from the Sherman Act. If the court meant that lobbying and similar political approaches to the legislatures and commissions would be protected, *Noerr* and later cases proved it correct. On the other hand, if the court meant to suggest that conspiracies to misuse judicial processes would be protected, the patent-antitrust cases and other later authorities proved the court incorrect. Whatever methods the court had in mind are merely subject to conjecture, however, and cannot serve to sustain either party’s position in this case.

(c) In *Harman v. Valley National Bank of Ariz.*, 339 F.2d 564 (9th Cir. 1964) defendants were charged with having induced the state attorney general to file a lawsuit against the plaintiff savings and loan association. The court held that the Sherman Act did not apply since the lobbying of the attorney general, a member of the executive branch of government,

“would be essentially political in nature.” (339 F.2d at 566.)

Plaintiffs agree with the court's conclusion. The case is virtually indistinguishable from *Noerr* and *Pennington* since the defendant combination sought to influence a member of the executive branch of the state. Unlike the present case, there is absolutely no contention in *Harman* that the combination sought to misuse judicial procedures as a means of eliminating competition. The attorney general brought a lawsuit against the plaintiff, but that was clearly an act of government protected from the Sherman Act under the doctrine of *Parker v. Brown*. The defendants sought only to influence the attorney general, and within the bounds of *Noerr* such activity was both non-judicial and political in nature.

(d) In *Assoc. of Western Railroads v. Riss & Co.*, 299 F.2d 133 (D.C. Cir. 1962) the defendants, many of whom were also defendants in *Noerr*, were charged with conspiring to suppress competition through many of the same activities as alleged in *Noerr*, none of which consisted of a conspiracy to restrain trade through the use of judicial processes.⁵ In fact, the only allegation which was even remotely similar to those in the present case was that defendants' public relations activities induced citizens to register com-

⁵The acts alleged were a public relations campaign against the plaintiffs; lobbying and solicitation of state and city officials to enact laws, ordinances and regulations contrary to plaintiff's interests; lobbying of state officials to enforce statutes, ordinances and regulations contrary to plaintiff's interests; and similar activities. (See 170 F.Supp. at 357, 358.)

plaints against the plaintiff in ICC proceedings for new operating rights. The vast majority of the defendant's activities were not directed at these judicial type proceedings, however, but were clearly political within the meaning of *Noerr*. It is presumably for this reason that the Circuit Court characterized the activities alleged as *Noerr* activities, and did not even choose to mention the existence of the remote influence defendants had on ICC proceedings to resolve the disposition of private rights. In any event, this incidental effect on private rights would have to be held irrelevant since *Noerr* has made it clear that if the predominant nature of the activities is political, incidental restraints of competition, which standing alone would not be protectable, cannot serve to make the political activities subject to the Sherman Act. In the present case a use of judicial processes affecting private business rights is not incidental to political activities but constitutes the principal thrust of defendants' activities with only incidental efforts to influence the agencies.

(e) *Woods Exploration and Prod. Co., Inc. v. Aluminum Co. of Am.*, 36 F.R.D. 107 (S.D. Tex. 1963), and *Woods Exploration and Prod. Co., Inc. v. Aluminum Co. of Am.*, 284 F.Supp. 582 (S.D. Tex. 1968) together represent a split of authority demonstrating the great extent to which the definition of *Noerr*-type "political" activity is unsettled.

As the citations reveal, the *Woods* case came up twice before the District Court for the Southern District of Texas, first on motions to dismiss for failure

to state a cause and for summary judgment, and second for summary judgment. Plaintiffs and defendants both competed for gas derived from the same source. The amounts of gas which the parties were allowed to produce were regulated by the Texas Railroad Commission. The complaint charged the defendants with three kinds of conspiratorial activities aimed at reducing or eliminating plaintiff's production allowances: (1) the filing of false nominations (estimates) with the commission upon which it determined the amount of gas allowable to plaintiffs (see 284 F.Supp. at 584-594); (2) attempting to influence the commission to change its rules and regulations governing production allowances (see 284 F.Supp. at 594-596); and (3) instituting court litigation against plaintiffs in order to contest the validity of commission rules and regulations which permitted favorable allowances to plaintiffs (see 284 F.Supp. at 595-596).

In dealing with defendants' contention that *Noerr* shielded their activities from the Sherman Act, Judge Ingraham, in the first *Woods* case, recognized that *Noerr* protection extended only to political activity. (36 F.R.D. at 111.) Applying this principle to the allegations, the court stated as follows:

“First, is the conduct complained of in the instant case political in nature? If the defendants were enjoined from conspiring to submit false nominations to the Railroad Commission would they be deprived of any Constitutional right to petition or participate in the Governmental process? The answer clearly seems to be that the defendants would only be prohibited from under-

taking certain joint business behavior. To subject them to liability under the Sherman Act for conspiring to restrict production or to eliminate a competitor would effectuate the purposes of the Sherman Act⁴ and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in *Noerr*.

⁴Suppression of competition and restriction of production both fall within the common law activities held to be 'combinations in restraint of trade.' In enacting the Sherman Act, Congress took over the common law concept and condemned such restraints wherever they occur in or affect interstate commerce. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497-498, 60 S.Ct. 982, 84 L.Ed. 1311 (1940)."

(36 F.R.D. at 111-112.)

The Court of Appeals refused to review the District Court's denial of defendants' motion to dismiss, but noted that the defendants were not prejudiced from bringing a motion for summary judgment after the completion of discovery—a motion to which the defendants were normally entitled anyway. Following discovery, the defendants moved for summary judgment, and the allegations were reviewed again, this time by Judge Singleton. The existence of prior discovery, however, had no bearing on Judge Singleton's ruling. He merely reviewed the allegations of the complaint again, as Judge Ingraham had reviewed them before him. That no new factors entered into Judge Singleton's review was made clear by his own recognition that he was merely overruling Judge Ingraham, not ruling on different questions of law or fact.⁶

⁶In response to plaintiffs' motion that Judge Singleton had no authority to decide the same issues decided previously in the same court, Judge Singleton stated that "Whether to go into

Judge Singleton's authority to overrule a decision by the same court is not in issue here. It demonstrates clearly, however, that even when read most favorably to defendants, the second *Woods* decision represents nothing more than one side of a two judge split of opinion on the scope of *Noerr*-protected activity.

There are additional reasons that the second *Woods* case should not weigh heavily in the present case. The procedure by which the Railroad Commission determined production allowances was not an adversary procedure even resembling a judicial procedure as it is in the present case. The procedure in *Woods* called only for a filing of nominations or forecasts containing mathematical calculations on gas production. (See 582 F.Supp. at 587.) No notice of filings was given or required; no hearings were held; and no arguments were presented. There was no opportunity for defendants to institute protest proceedings causing the plaintiff great expense and delay as there was in the present case. The procedure for determining production allowances was essentially the same as lobbying or otherwise attempting to influence a legislative rule-making body.

the merits of the question previously decided in a case prior to final judgment is a matter within the considered discretion of the judge. [citing cases]. 'A United States district judge is most reluctant to reverse or change a ruling or order of another district judge, sitting on the same case, in the same court, and will do so only for the most compelling reasons. However, *the authority of a judge to overrule a previous decision of a prior judge, sitting on the same case in the same court is well-established * * ** The United States Supreme Court has rejected a doctrine of disability at self-correction * * *

[citing case].'" (284 F.Supp. at 585; emphasis the court's.)

As for defendants' attempts to influence the commission to change the rules, generally these too may be considered in the nature of lobbying or political influence. The attempts were made through *ex parte* filings with the commission, and no attempts were made through a use of judicial processes.

The only judicial processes invoked by defendants were their attempts to protest the commission's standards through court litigation. Judge Singleton found this activity also *Noerr*-protected (relying primarily on *Bracken's Shopping Center, Inc. v. Ruwe*, 273 F.Supp. 606 (S.D. Ill. 1967), considered below), but in this ruling the judge, we believe, was simply incorrect. The court made no mention of the patent-antitrust cases. Those cases, having been decided by higher courts on many occasions (see appellants' opening brief, p. 26, et seq.), would, to the extent of any conflict, clearly override Judge Singleton's ruling in *Woods*.

(f) In *Baltimore & Ohio RR. Co. v. New York, New Haven & Hartford RR. Co.*, 196 F.Supp. 724 (S.D.N.Y. 1961), the counter-defendants were charged with propagandizing the Interstate Commerce Commission and the Senate Committee on Interstate and Foreign Commerce, and with instituting proceedings in the Interstate Commerce Commission and the courts in order to enforce payment of disputed per diem charges. At the conclusion of a lengthy opinion, the district court made reference to these activities and concluded that in addition to the other grounds stated, *Noerr* protected such activities from the Sherman Act.

To the extent that the court applied *Noerr* to the propaganda activities of counter-defendants, plaintiffs have no quarrel with the court's opinion. On the contrary, plaintiffs believe that this activity is representative of the type of political activity which *Noerr* meant to protect.

As for the judicial activity alleged, there was no clear allegation of conspiracy to harass similar to those in the present case, and the court did not attempt a reasoned analysis of the allegations on these grounds. It made a one-line reference to the filing of lawsuits and the propagandizing of the commission implying without explanation that both activities were indistinguishable under *Noerr*. To the extent that this reference can be read as authority for the proposition that conspiratorial uses of judicial proceedings are not subject to the Sherman Act, the patent-antitrust cases clearly speak otherwise, and the court's application of *Noerr* to judicial abuse—if it was meant to be such—is simply incorrect.

(g) In *Bracken's Shopping Center, Inc. v. Ruwe*, 273 F.Supp. 606 (S.D. Ill. 1967) the court found that the defendants' court challenge of a city ordinance, even if coupled with anti-competitive intent, was protected under *Noerr*. In light of the absence of any consideration of the patent-antitrust cases or other authority holding that restraints of trade through judicial processes may be subject to the Sherman Act, plaintiffs believe that *Bracken* is scant authority for defendants' arguments.

(h) In *Schenley Industries, Inc. v. N. J. Wine and Spirit Wholesalers Assoc.*, 272 F.Supp. 872 (D.N.J. 1967), defendants were charged with price-fixing and lobbying the State Legislature and the Alcoholic Beverage Control agency in order to obtain the passage of a bill. (272 F.Supp. at 875, 883, 884, n. 20.) The court found that all of the acts alleged constituted lobbying activities, and thus that *Noerr* and *Pennington* shielded them from the Sherman Act. There was no argument presented that defendants had instituted judicial type proceedings before the agency. The case delineates nicely the type of lobbying activities which should be protected under *Noerr*. Beyond that, however, the case has no bearing on the issues presently before the court.

(i) In *AB&T Sightseeing Tours, Inc. v. Gray Line New York Tours Corp.*, 242 F.Supp. 365 (S.D.N.Y. 1965), the defendants were charged with various anti-competitive activities including "lobbying activities with legislative bodies and administrative agencies of the city of New York to enact and promulgate laws and regulations designed to suppress and eliminate competition between defendant and its competitors, including the plaintiffs." (242 F.Supp. at 369, 370.) The court properly found that these activities were *Noerr*-protected. There were no allegations that defendants had attempted to eliminate competition through a scheme of litigation or the use of administrative judicial type processes. As such, the case is of no support for the proposition that such a scheme is unreachable by the Sherman Act.

(j) In *U.S. v. Johns-Manville Corp.*, 259 F.Supp. 440 (E.D. Pa. 1966) the defendants and co-conspirators were charged with anti-competitive activity including the influencing of state and local government units to adopt specifications adverse to defendants' competitors. The activities consisted of lobbying and other informal approaches and thus fell within the protection of *Noerr*. There were no allegations that defendants and their co-conspirators had attempted to eliminate competition through a program of harassment in judicial proceedings of administrative agencies or the courts. The case, therefore, has no bearing on the issues presently before the court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the district court's order dismissing plaintiffs' cause of action be reversed, and the cause remanded for trial.

Dated, San Francisco, California,

May 29, 1969.

BROAD, BUSTERUD & KHOURIE,
MICHAEL N. KHOURIE,
J. STANLEY POTTINGER,
Attorneys for Appellants.

No. 22492. ✓

IN THE

See Vol. 3482
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United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA EDISON COMPANY, a corpora-
tion,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Petition for Rehearing
and

Suggestion of Appropriateness of Rehearing in Banc.

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No. 22492.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Petition for Rehearing
and

Suggestion of Appropriateness of Rehearing in Banc.



Appellant files herewith its petition for rehearing on the grounds that this Honorable Court has overlooked and misapprehended points of law and fact.

Appellant suggests a rehearing *in banc* because the proceeding involves a question of exceptional importance in that a Constitutional right of the highest order has been denied to Appellant by the Summary Judgment of the District Court and because this denial has been affirmed by the Court of Appeals without, it is respectfully submitted, real consideration of the basic Constitutional points.

Specific Grounds of Petition for Rehearing.

1. In its opinion, the Court said, "It was stipulated in the District Court that the issue (unconstitutional discrimination) was an appropriate one for summary judgment." This is a misapprehension of the record and is simply not the fact.

2. The Court has affirmed a summary judgment, placing on Appellant the burden of overcoming the presumption of Constitutionality by affidavit on a Motion for Summary Judgment brought by Plaintiff. This is expressly contrary to law.

3. The Court has misapprehended the law with reference to the equal protection clause, as incorporated in the due process clause and has, in substance, ruled that the issue of discrimination is irrelevant when the party discriminated against is a "profit" corporation and the party in whose favor the discrimination operates is a "non-profit" Governmental proprietary entity.

4. The Court has failed to deal at all with the position taken by Appellant in its Argument that the actions of the Forest Service in treating privately-owned and publicly-owned utilities differently is contrary to its sole statutory authorization to make regulations for the use of rights of way in the national forest for electrical

plants and, in so doing, has misapprehended the import of the only case cited in its opinion.

5. The opinion has required Appellant to overcome the presumption of Constitutionality by affidavit in a summary judgment proceeding, in the face of a specific holding by the District Court that *any* evidence offered by Appellant was immaterial and irrelevant. Therefore, all the affidavits in the world would have been useless.

The Court Inaccurately Stated That the Parties Had Stipulated That the Constitutional Issue Was Appropriate for Summary Judgment.

On Page 3 of its opinion, this Court said, "It was stipulated in the District Court that the issue was an appropriate one for summary judgment." The issue referred to was the claim of unconstitutional discrimination. *There was no such stipulation.* The Reporter's Transcript clearly so indicates. Beginning on Page 3, the Court asked the parties if they did not agree that the case was ripe for summary judgment. The Court said:

"It gets down to the construction of this contract and the interpretation of it; and it is really a question of law, isn't it? And I take it that one might almost say that if a motion for summary judgment is denied on the ground that the contract should not be construed as sought, that a reciprocal motion for summary judgment would be forthcoming."

Counsel for Appellant said:

"Certainly, your Honor, *if that was the procedure that was appropriate . . .* I am naturally convinced of my own position, that the document (the permit granting the right of way) does not support the Government's position either upon motion for summary judgment or at any other time."

Counsel for Appellant did agree that the contract was one which had to be judged by its four corners, and

that the decision as to the meaning of the contract was an issue of law. [R. Tr. p. 4]*.

Appellant contended, and the Court recognized, that the Constitutional issue was the issue upon which Appellant sought to introduce factual evidence. The Court said:

“The Constitutional issue is really the only one upon which you would seek to introduce some factual evidence.” [R. Tr. p. 5].

Appellant then detailed, to some considerable extent, the nature of that evidence [R. Tr. p. 5].

The Court then said:

“If the Court would exclude the evidence on the grounds of incompetency and immateriality, then there is no need to have an unnecessary trial for the purpose of permitting the evidence to be offered.” [R. Tr. p. 6].

On this assumption only did counsel agree that a trial would be unnecessary [R. Tr. p. 6].

The only stipulations that counsel or Appellant entered into are the written stipulations in the transcript of the record; namely:

(a) The stipulation regarding the facts and the issues filed August 11, 1967 [T. 92].

(b) The second stipulating regarding facts and issued filed September 13, 1967 [T. 172].

(c) Several stipulations for continuance [T. 80, 82, 90].

There were no other stipulations, written or oral. At no time did Appellant stipulate that the Constitutional issue, or any issue, was appropriate for summary judgment.

*Hereafter the Reporter's Transcript is cited "R. Tr." and the transcript of record [Clerk's Transcript] as "T."

**The Court Has Placed the Burden of Overcoming
the Presumption of Constitutionality on the
Party Resisting a Motion for Summary Judgment,
Contrary to Law.**

The Court of Appeals has placed the burden of overcoming the presumption of Constitutionality upon Appellant on a motion for summary judgment. Of course, all actions are presumed Constitutional and a party who asserts their unconstitutionality has the burden of proof, but *not* on a motion for summary judgment. All intendments are against the moving party on such motions. This includes Constitutional issues. On trial, Appellant would have had the burden of sustaining its contention of unconstitutional Forest Service Action. But on summary judgment, every position taken by the movant is presumably wrong including its position on Constitutionality. In this short petition, it is impossible to list the hundreds of cases so holding, but we suggest a few principles and authorities:

(a) On motion for summary judgment, all doubts are resolved against the movant.

Cases Collected in 28 U.S.C.A. (Rules 52-58),
Pages 308, *et seq.*

(b) On motion for summary judgment, every intendment and presumption is to be taken contrary to the position of the movant. Summary judgment is never a substitute for trial on any factual issue.

Griffeth v. Utah Power & Light Co. (9th Cir.),
226 F. 2d 661;

Cases Collected in 28 U.S.C.A. (Rules 52-58),
Pages 311-336.

(c) A motion for summary judgment must be granted only with a great caution and reluctance, and only in the clearest of cases even if the ad-

verse party's position is surmised to be futile, unless it is sham.

Atlas Sewing Machine Co., etc. v. National Assoc., 260 F. 2d 803;

United States Steel Co. v. Vasco Metals Corp., 394 F. 2d 1009;

Union Carbide Corp. v. Hicks, 162 F. Supp. 612;

Union Transfer Co. v. Riss, 218 F. 2d 553.

Here Appellant suggested the facts, by affidavit, argument, judicial notice and admission, that it would establish at trial the nature of the unconstitutional discrimination:

(a) Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment [T. 128].

(b) Defendant's Memorandum of Contentions of Fact and Law [T. 161].

(c) Defendant's Request for Change and Additional Findings of Fact and Law [T. 175].

(d) Affidavits [T. 118 and 120].

(e) Statement of Opposition to Motion for Summary Judgment and Statement of Genuine Issues [T. 156].

(f) Argument in open court [R. Tr. 5, 6, 7, 9, 10-12, 14].

In addition, there was before the Court, of course, all matters which it judicially noticed.

Cases Collected in 28 U.S.C.A., Rule 56, Note 89.

The facts so judicially noticed were extensively pointed out to this Honorable Court. In summary, on a motion for summary judgment where the basic issue was the unconstitutionality of the Government's action, this Court has placed the burden of proof on the party resisting the summary judgment. The law in the premises is directly contrary.

The Court Has Precluded Appellant Because It Is a Corporation Organized for Profit From Making Its Contention That It Has Been Unconstitutionally Discriminated Against.

In essence, the entire decision of the Court of Appeals is that discrimination, as a Constitutional claim, is not available to appellant because it is a profit-seeking corporation, and the parties in whose favor the discrimination operates are so-called municipal proprietary corporations. Certainly this cannot be the law. Governmental corporations may today enter into almost any business on a proprietary basis. The United States operates clothing and gun factories. The City of Los Angeles operates a power and light system. *Springfield* operated a utility; Long Beach operates an entertainment center; Los Angeles County, a music center. If the Court is correct and equal protection is denied to the private competitors of such public bodies, which operate exactly the same business in a proprietary capacity, by governmentality granted privileges which are denied to their private competitors, the result could completely eliminate private enterprise.

Surely, upon reconsideration, it will be manifest to the Court that the problem of unjust discrimination requires a more discerning analysis of economic reality than sole reliance upon whether the semantic term "profit-making" is applied to the party seeking Constitutional protection. Nowhere in the equal protection clause, nor in the due process clause, can we find any hint of an exception reading, "Notwithstanding the language of the foregoing paragraph of this Constitution, the same is not applicable to profit-making corporations."

The lone judicial authority cited by the Court is *Springfield Gas Co. v. Springfield*, 257 U.S. 66. This was a decision in 1921 written by Mr.

Justice Holmes. The fact situation was this: Illinois law granted rate-making powers to the State Public Utilities Commission for privately-owned public utilities, and granted the same authority to city councils in the case of city-owned utilities. Springfield, chartered a municipal utility in its proprietary function, and then in its governmental function fixed its rates. The Springfield Gas & Electric Co., whose rates were regulated by the State Public Utilities Commission, contended this was an unconstitutional discrimination. The Court, speaking through Mr. Justice Holmes, held it was not. That is all the case held. The limited meaning of *Springfield* has been made clear by subsequent decisions. It has been cited by four Supreme Court decisions:

National Life v. U.S., 277 U.S. 535;

Public Service Commission v. Great Northern Utilities, 289 U.S. 134;

Puget Sound Power & Light Co. v. Seattle, 291 U.S. 619;

New York v. U.S., 326 U.S. 582.

All of these cases treat *Springfield* as essentially a tax case. This is most clearly made evident in the dissent in *National Life v. U.S.*, written by Mr. Justice Brandeis and concurred in by Mr. Justice Holmes himself. The concept that making a profit deprives one from equal protection is not at all further mentioned by the Supreme Court of the United States in its consideration of the *Springfield* case. The tax meaning of the case is constantly re-emphasized. For example, in *Puget Sound supra*, at page 625 the court stated: "The municipality which is enabled to function only because it is a tax gatherer may . . . conduct a business in the interest of the public welfare, and *its gains* if any must be used for public ends," (Emphasis added), thus recognizing the "profit" potential of and the use thereof, by such municipal corporations.

Moreover, further light is cast upon *Springfield* by the Court of Appeals in *City of Seymour v. Texas Electric Service Company*, 66 F. 2d 814 at 817. The Court noted there that municipally-owned utilities may have their rates fixed at a lower figure than their private competition is required to charge. The Court then refers to the “profit” paragraph of the *Springfield* decision, and says, “The reason for this language is not far to seek.” The Circuit said, “When the City regulates the rate of the City-owned public utility, it acts not as a City in its proprietary capacity, but it acts as the State as regulator.” In essence, the Circuit points out that what Justice Holmes was saying was that, while there was rate regulation in both cases, the same body did not have to do the rate making, and that it would be presumed that the City, acting in its governmental capacity, was establishing fair and reasonable rates, just as the State Public Utilities Commission was establishing fair and reasonable rates for the privately-owned utility. This bifurcation of rate-making authority was held not unconstitutional.

The Court Has Completely Overlooked the Contention That the Forest Service Exceeded Its Sole Statutory Authority.

The Court recognizes that it is conceded that the Forest Service seeks to place absolute liability only on *privately-owned* utilities. In argument, Appellant pointed out that Volume 16 of the United States Code, Section 522, required that permits to use the national forest for electrical purposes were to be issued “under *general* regulations to be fixed by him to permit use of the rights of way through the national forest for electrical plants by *any* citizen, association or corporation of the United States” (Emphasis added). The statutory authority is thus limited to general regulations applicable

to all alike. By issuing discriminatory regulations, the Forest Service has exceeded its statutory authority. Its purported justification for such discrimination is specious and violates Art. VI of the Constitution.

The Opinion Has Required Appellant to Rebut the Presumption of Constitutionality by Affidavit Despite the Ruling of the District Court That All Evidence Would Be Immaterial and Irrelevant.

On motion for summary judgment, affidavits of the resisting party may be filed but are not required. Rules of Procedure, Rule 56(c).

All other documents, arguments and materials judicially noticed are relevant and to be considered.

Hiern v. St. Paul Mercury Insurance Co., 262 F. 2d 526;

Inglett & Co. v. Everglades Fertilizer Co., 255 F. 2d 342;

Wittlin v. Giacalone, 154 F. 2d 20, where the Court said, among other things, that the District Court should be critical of papers presented by the movant, but not of the opponent's papers.

These rules, however, would be relevant to every case, but in our case there is a special matter. The Honorable District Judge made this abundantly clear. He said:

"This is not a Constitutional argument of merit and . . . offered evidence contained in the affidavits would be irrelevant and immaterial and the fact that it exists does not militate against the granting of the summary judgment motion." [R. Tr. pp. 23 and 24]. (Emphasis added).

It is both good law and good sense that no one need do a useless thing. Certainly, in the face of this record this Court cannot justly say, as it did, "The burden of overcoming the presumption of Constitutionality was with Appellant. . . . No showing was made by Appellant in its affidavits submitted to the District Court as to what exploration of the subject might produce" and that "we come too late to dig deeper into the nature of the discrimination." (Opinion p. 3). This Honorable Court, we respectfully submit, in affirming the District Court, has said, on the one hand, "You should have proved your case below by affidavit" and on the other hand has said that the District Court was right in saying that the affidavits and further evidence were wholly immaterial and irrelevant. Has the Constitutional door not been improperly closed to us by the combination of the two positions?

Conclusion.

The case is of great importance. It is a case of first impression, on the Government's own admission involving a contention having widespread application. An exceptional rule of law, absolute liability, has been made binding on Appellant, without a day in court to challenge the Constitutionality of such an unusual application with its bizarre results.

We earnestly pray a rehearing and suggest the importance of the decision requires a rehearing *in banc*.

Respectfully submitted,

ROLLIN E. WOODBURY,
RICHARD T. DRUKKER, and
HUGH B. ROTCHFORD,

Attorneys for Appellant.

Certificate.

We hereby certify that in our judgment the petition for rehearing is well founded and further certify that it is not interposed for delay.

ROLLIN E. WOODBURY

RICHARD T. DRUKKER and
HUGH B. ROTCHFORD

By ROLLIN E. WOODBURY

MAY 6 1969

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

-----)
Norvin E. Powell, III)
)
Appellant)
)
)
vs.)
)
United States of America)
)
Appellee)
-----)

✓
No. 22556

(Crim.)

Appeal from the United States
District Court for the Central
District of California

Brief for Appellant

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I. INTRODUCTION:

This is an appeal from a judgment of conviction for six separate counts as follows: Counts I and IV (concealing and transporting narcotics); Counts II and V (selling narcotics); and Counts III and VI (transferring narcotics.) Counts I, II, IV and V are based upon 21 U.S.C. 176a, and Counts III and VI are based upon 26 U.S.C. 4742a.

An indictment against appellant Norvin Ethan Powell, III, was filed on May 18, 1966, for the above mentioned counts. Powell was arraigned and pled not guilty to all counts on May 31, 1966. The minutes of the court of June 21, 1966, show that Powell's motion for a continuance of the trial was denied. After a two day trial, Powell was found guilty of all charges by the jury on June 22, 1966. The jury's verdict was filed on the same day.

At the sentence proceedings on July 12, 1966, Powell was sentenced to five years imprisonment for each of the counts, to begin and run concurrently. A judgment and commitment were filed on July 12, 1966. Notice of appeal was filed by appellant Powell on July 15, 1966.

1. References are to the thin clerk's transcript in this introduction. Because the pages are confusingly numbered, no reference is made to the page numbers in the "References" section.

II. FACTS:

Paul N. Kayne, the first witness for the prosecution, testified that he was a chemist and identified two packages which were each composed of two bricks of marijuana. (TR 3:3-8:4.) On cross-examination he stated that he had made no determination indicating the source of the plant material which he identified as marijuana. (TR 8:5-21.)

The chain of custody of the two exhibits was stipulated to by counsel. (TR 9:11-10:24.)

William Turnbou, a federal narcotics agent, testified that he knew Powell. (TR 13:2-6.) He went to Powell's house at 1514 1/2 Ewing Street in Los Angeles with Leroy C. Dukes, Sr., who was also known as "Abdula," on April 11, 1966, about 9:30 p.m. (TR 13:8-20.)

Abdula introduced the witness to Powell, stating that the witness wanted some "pot." (TR 14:8-18.) Powell quoted a price of \$135 per kilogram. After the witness agreed to buy, Powell left with his bass fiddle. He returned about midnight with the marijuana and exchanged it for \$270 the agent had. (TR 15:1-20.)

On April 27, the agent made a similar purchase

from Powell while with Abdula. (TR 17:8-18:6.) The terms and details of the transaction were approximately the same. (TR 18:5-21:2.) On cross-examination the agent testified that he met Abdula in February, 1965. At the time Abdula was charged with smuggling heroin in from Mexico. (TR 21:12-23:7.) The government rested; Powell's motion for acquittal was denied. (TR 48:7-13.)

Abdula testified that he was an unemployed musician and truck driver. (TR 50:1-10.) He was arrested for smuggling five ounces of heroin from Mexico in April, 1965. (TR 50:18-52:13.) He was indicted in May, 1965, and was presently free on bail. (TR 52:18-53:12.)

Abdula met Powell in early 1965 at a club called Mother Neptune's. (TR 56:16-57:1.) Abdula went to Powell's house from time to time and they discussed music and narcotics. (TR 58:11-62:18.) Abdula began working for the narcotic enforcement officers in February, 1966. (TR 73:1-5.) He had been indicted but had not gone to trial during the eleven month period. His trial had been set on several occasions, but was continued from time to time. He agreed to

work for the narcotics bureau as an informer in November, 1965. Because of this, he believed that he would be given "consideration for cooperating," and did "expect something in return." (TR 73:4-76:3.) His testimony was substantially similar to agent Turnbou's.

Powell testified that he had seen Abdula use narcotics; Abdula had also tried to sell him narcotics. (TR 110:17-111:7.) On April 3, Abdula came to Powell's house and offered to return a bass fiddle if Powell would do some work for him. (TR 116:9-117:2.) The next day Abdula asked Powell to "front" for him in some sales of narcotics. (TR 116:6-117:15.) Abdula was to bring the purchasers to Powell's house, and all Powell had to do was act as if the narcotics were his. (TR 128:4-9.) Abdula phoned and pestered him on April 5. (TR 132:1-7.) By trickery Abdula forced Powell to complete a sale of Marijuana on April 6. (TR 132:8-135:5.)

Powell and Abdula later almost came to blows because of this. (TR 135:11-136:9.) Abdula threatened him. (TR 136:21-137:5.) Prior to April 27, Abdula tried to get Powell to handle another transaction.

(TR 140:3-17.) Abdula eventually forced him into it by telling Powell that if he cooperated, Abdula would return Powell's valuable bass fiddle. (TR 140:20-141:4.) Another sale took place on April 27 (TR 142:12-147:3), but Powell refused Abdula's later requests. (TR 147:19-23.)

During cross-examination, the court participated by asking a very specific question concerning the phone number of Abdula's contact, Pocci. (TR 172:8-173:17.) The incident is discussed in detail, infra.

Reynoldo Navarro testified that Abdula had sold him some marijuana in January of 1966. (TR 121:1-22.) On cross-examination he testified that he was presently in custody for the conviction of a marijuana offense. (TR 122:9-16.)

Agent Turnbou testified in rebuttal. (TR 190:1-3.)

Errors committed by the trial judge in instructing the jury are described in detail, infra.

III. QUESTIONS PRESENTED:

- A. It was prejudicial error for the trial court to comment on the credibility of appellant's only defense witness.

- B. It was prejudicial error for the trial court to cross-examine Powell.
- C. It was prejudicial error for the trial court to allow the marijuana to be taken into the jury room.
- D. Powell was denied the effective assistance of counsel.
- E. A conviction based upon evidence coerced from an informant by granting continuances in his own criminal trial so that he could "finger" other marijuana violators must be set aside.
- F. There was no evidence which would allow the jury to find that Powell knew that the marijuana "had been imported and brought into the United States contrary to law."
- G. The instruction of the trial court erroneously switches the burden of proof to Powell.
- H. Since the requirements of reasonable notice and demand by the Secretary of the Treasury under 26 U.S.C. 4744-A were not proved at trial, it was reversible error to instruct the jury on that point.

IV. ARGUMENT:

- A. It was prejudicial error for the trial court to comment on the credibility of appellant's only defense witness.

In commenting on the credibility of Powell's only defense witness, Navarro, the court stated: "Now this is just my opinion, because of the contrast in his testimony, and for other reasons, that testimony is not worthy of belief." (TR 206:14-17.) This directly implied that Powell was guilty, as only a guilty man would put a liar on the witness stand to fabricate favorable evidence.

A jury is sensitive to manifestations, however subtle, of the judge's belief in the defendant's guilt or innocence. (Moore's Federal Practice (1967) Instructions, §30.02, p. 30-3.) It is difficult enough to try to maintain an appearance of judicial impartiality in a criminal case, but when the judge is permitted to verbalize his personal reactions to evidence, the difficulty is compounded. And the difficulty is scarcely alleviated by off-handedly telling the jury, "Now this is just my opinion, . . ." (RT 206:14.)

In Blunt v. United States (CADC 1957) 244 F.2d 355, it was held reversible error where the trial court instructed the jury that the defense psychiatrists'

opinion was just a "feeling" and not based on fact.

No objection was necessary in this instance as FRCP 52 controls FRCP 30. (Screws v. United States (1945) 325 U.S. 91, 107; Moore's Federal Practice (1968) Harmless and Plain Error, §52.03[2], p. 5213.)

If it is necessary for a judge to comment upon the credibility of a witness, then there is something seriously wrong with our method of trying facts and we must begin to ask some critical questions about the premises of the adversary system.

B. It was prejudicial error for the trial court to cross-examine Powell.

During Powell's cross-examination concerning his telephone conversation with Abdula's drug supplier, Pocci, Powell testified that he was coerced by Abdula to call the supplier. (TR 173:2-13.) The court sarcastically asked Powell the first two digits of the phone number. (TR 173:14-15.)

Without doubt this was reversible error for the court to participate in Powell's cross-examination. To ask Powell such an irrelevant question was obviously a reflection of the court's lack of belief in Powell's

testimony, and without question the jury was influenced thereby.²

The judge must not assume the role of an advocate or of a prosecutor. (United States v. Lee (CA7,Wis. 1939) 107 F.2d 522, 525, cert. den. 309 U.S. 569.) The trial court therefore committed error.

C. It was prejudicial error for the trial court to allow the marijuana to be taken into the jury room.

The trial court allowed the two government exhibits of marijuana to be taken into the jury room. (TR 203:15-19.) Allowing exhibits such as this to be taken to the jury room in criminal cases is prejudicial and in no way facilitates effective jury deliberation.

2. An additional example of the judge's influence on the jury occurred as follows: On the first day of trial the court let the jury go at 4:00 p.m. to avoid the "freeway traffic." (TR 105:1-14.)

It is interesting to note that the jury returned with a verdict on the second day of trial also exactly at 4:00 p.m. (TR 224:10-11.)

Such circumstances indicate that the jury were supple in complying with the judge's apparent wishes.

(Karn v. United States (CA9, Alaska 1946) 158 F.2d 568, 572, overruled on other grounds; Kaplan v. United States (CA9, Cal. 1964) 329 F.2d 561; People v. Bartone (1958) 172 N.Y.Supp.2d 976; Orfield, Criminal Procedure Under the Federal Rules (1967) §26:683, pp. 257-259.)

The marijuana had been properly identified as such to the jury during trial (TR 3:24-7:23), and there was no need to send it into the jury room. Marijuana has a peculiar odor, and to allow it to be taken to the jury room would cause the jury to pay unnecessary attention to it, thereby interfering with its deliberations.

If this court approves with this procedure, it is only logical to conclude that it would also approve sending bloody knives used in murders, the undergarments of a rape victim, or grisly pictures into the jury room. Although the use of such evidence may be very proper at trial, sending such evidence to the jury room unduly emphasizes one fact of the case, the gravity of the crime committed.

The trial court therefore committed prejudicial error.

D. Powell was denied the effective assistance of counsel.

In a motion for a continuance Powell's counsel stated that on the day previous thereto, Powell informed him that the witnesses that Powell intended to call were in Mexico City. The attorney stated that without their testimony or presence, Powell would be extremely prejudiced. (STR b:9-18.)³ The motion was denied and Powell went to trial the same day. The only reason given by the court was that the court would not reverse his fellow member of the bench, who had ruled similarly earlier in the day. (STR b:25-c:7.)

The Sixth Amendment requirement of assistance of counsel is one of substance and not of form. It cannot be satisfied by a pro forma or token appearance and a defendant is entitled to effective aid in the preparation and trial of the case. (Powell v. Alabama (1932) 287 U.S. 45, 56-58, 71.) One aspect of effective assistance is adequate time for counsel to prepare for trial. (Comment (1967) 8 Santa Clara Law. 108; and cases cited therein.)

There is no express provision in the Federal

Rules of Criminal Procedure for a motion for a continuance, although there is no question of its availability upon a proper showing. Certainly a need for time to produce witnesses in defense would be a proper showing.

Since the motion was denied, Powell was forced to dig into the "bottom of the barrel" for Novarro, who became Powell's Achilles' heel in the court's charge to the jury. (See issue A, supra.)

Under the Sixth Amendment Powell was entitled to have the effective assistance of counsel for his defense and to have compulsory process for obtaining witnesses in his favor. In this case, the former was impossible without the latter. To one accused of crime these are very substantial rights. Yet they are barren if given at a time when assistance by counsel in issuing subpoenas is impracticable and when service of subpoenas and the appearance of witnesses is impossible. (Paoni v. United States (3d Cir. 1922) 281 F. 801, 803; Neufield v. United States (USDC 1941) 118 F.2d 375, 391, concurring opinion.)

While it is probable that the trial court had some reason for denying the motion, none appears in the record. The record discloses with certainty only one

thing, it does not tell the whole story. Because the trial judge did not make an adequate record, he abused his discretion. (Paoni v. United States, supra at p. 804.)

Because of the denial of effective assistance of counsel, the denial of compulsory process of witnesses, and for failure to preserve an adequate record, the judgment should be reversed.

E. A conviction based upon evidence coerced from ~~a~~informant by granting continuances in his own criminal trial so that he could "finger" other marijuana violators must be set aside.

LeRoy "Abdula" Dukes was arrested for smuggling five ounces of heroin across the Mexican border in April, 1965. (TR 49:24-52:13.) This was approximately one year before he "set up" Powell. (TR 203:20-208:19.) Abdula was indicted by the grand jury in May, 1965. (TR 52:18-21.) He had never been brought to trial on these matters. (TR 53:2.) His systematic contacts with Powell on the pretext of giving him bass fiddle pointers and instructions is well-detailed in the record. (TR 55:3-71:22.) Abdula's trial had been set and too conveniently continued during the eleven months prior to nabbing Powell. (TR 73:9-74:5.)

Abdula agreed to be an informer for the

Narcotics bureau. (TR 74:5-21.) He was promised that he would be given "consideration" for cooperating, and Abdula expected something for cooperating. (TR 75:12-22; 76:1-3.)

Such a situation is analagous to that presented in Williamson v. United States (CA5 1962) 311 F.2d 441, 444, where in the absence of justification for a contingent fee arrangement, convictions based upon evidence of informers hired under a contingent fee arrangement to produce evidence against a defendant cannot stand as to crimes not yet committed at the time of the hiring.

In our facts, at no time did the government justify their contingent arrangement with Abdula, i.e. as long as he cooperated, they would not prosecute and would allow him his freedom. In addition, Abdula was hired before the crimes were committed.

"The crucial question . . . to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power. For answer it is wholly irrelevant

to ask if the 'intention' to commit the crime originated with the defendant or government officers, or if the criminal conduct was the product of 'the creative activity' of law enforcement officials.

(Sherman v. United States (1958) 356 U.S. 369, 382.)

The use by the government of a confirmed narcotic offender as an informer, while there is pending against him serious charges of narcotic violations has been condemned. "Today and tomorrow, following the law, we shall be forced to convict on the basis of evidence obtained by enforcement officials using informers who are helpless victims of habit."

(Matysek v. United States (CA9 1963) 321 F.2d 246, 249.)

F. There was no evidence which would allow the jury to find that Powell knew that the marijuana "had been imported and brought into the United States contrary to law."

Counts I, II, IV and V require the jury to find that Powell knew that the marijuana "had been imported and brought into the United States contrary to law." (TR 203:21-205:10.) A search of the record in this case reveals no evidence to support this conclusion. The only evidence presented which was even related to this point, was the statement of the

prosecution's expert that:

"Q Is it possible, Mr. Wayne, to tell whether or not Exhibits 2 -- 1 and 2, which are now before you, were in fact grown in the United States or grown in Mexico?

A To the best of my knowledge, I do not know of a way of definitely distinguishing the source of origin of the plant material."
(TR 8:16-20.)

The jury was instructed: "You are to be governed, therefore, solely by the evidence introduced in this trial" (TR 207:12-14.) Since no evidence was produced by the prosecution to prove that the marijuana "had been imported and brought into the United States contrary to law," the four convictions under these counts must be reversed.

The prosecution committed a strategic error: because it did not have the necessary evidence, it should have turned this evidence over to state authorities for conviction under state law.

G. The instruction of the trial court, erroneously switches the burden of proof to Powell.

The trial judge instructed the jury concerning counts I, II, IV and V of the indictment that, "Whenever on trial for a violation of this section, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient

explains his possession to the satisfaction of the jury." (TR 212:2-8; 215:6-11.) Even though the judge cautioned the jury that, "This statute does not change the fundamental rule that the accused is presumed innocent, until proven guilty" (TR 215:12-19), this was so conflicting as to amount to serious error and a misinstruction.

The burden was therefore on Powell to prove that the marijuana was not imported. The burden is on the prosecution to prove every essential element of the crime charged, every fact and circumstance essential to the guilt of the accused, and the prosecution must meet this burden. (22A C.J.S. Criminal Law, §566, pp. 308-310, and voluminous authority cited therein.)

These four convictions should therefore be reversed.

H. Since the requirements of reasonable notice and demand by the Secretary of the Treasury under 26 U.S.C. 4714-A were not proved at trial, it was reversible error to instruct the jury on that point.

The trial court gave the following instruction regarding the charge under 26 U.S.C. 4742a (transferring narcotics, counts III and VI herein): "Proof that any person shall have had in his possession any marijuana and shall have failed after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by Section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by Section 4741(a)." (TR 213:2-10.)

The court erred by instructing the jury as to law pointing to or presuming Powell's guilt when there were absolutely no facts in the record to support the instruction. No demand was ever shown to be made by the Secretary or his delegate.

The court also instructed the jury that an essential element of counts III and VI was the transfer without the written order from the buyer. (TR 216:9-16.) Since no demand was made on Powell by the Secretary of the Treasury, an essential element of Counts III and VI was not proved. (See issue F, supra.)

Hence, the convictions resulting from Counts
III and VI should be reversed.

V. CONCLUSION: Because of the numerous errors
in the trial of Powell, all counts of the conviction
must be reversed.

April, 1969

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE MALAGON-RAMIREZ,

No. 22588 ✓

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court

for the Southern District of California

Honorable Fred Kunzel, District Judge

BRIEF IN SUPPORT OF MOTION OF
COUNSEL TO BE RELIEVED FROM
PERFECTING AND PROSECUTING
PETITION FOR CERTIORARI.

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BRIEF IN SUPPORT OF MOTION OF
COUNSEL TO BE RELIEVED FROM
PERFECTING AND PROSECUTING
PETITION FOR CERTIORARI.

ISSUE PRESENTED FOR DETERMINATION

May counsel, who was appointed pursuant to the Criminal Justice Act and who represented appellant in an appeal to the Court of Appeals which resulted in an affirmance of the judgment of the District Court, refuse to prepare and file a petition for certiorari in the United States Supreme Court on behalf of appellant, upon the ground that, although he believes that the judgment of the Court of Appeals is incorrect, he is also of the opinion that the errors, considered in the light of Rule 19 of the

Rules of the Supreme Court of the United States, are not of such a nature as to justify the filing of a petition?

STATEMENT OF THE CASE

Appellant was convicted in the United States District Court for the Southern District of California of smuggling, concealing, and facilitating the transportation and concealment of approximately one ounce of heroin and 70 pounds of marijuana in violation of United States Code, Title 21, Sections 174 and 176(a). (R. 2-5, 21). He appealed, and this Court affirmed the conviction. (MALAGON-RAMIREZ vs. UNITED STATES, 404 F.2d 604).

Appellant was permitted to appeal in forma pauperis and his present counsel, J. Perry Langford, was appointed by the District Court to represent him on appeal. (R. 27-28). After the judgment of conviction was affirmed by this Court, appellant requested counsel to prepare and file a petition for certiorari in the United States Supreme Court. Instead of doing so, counsel for appellant filed in the United States Supreme Court a document entitled, "Refusal of Counsel Appointed Under the Criminal Justice Act of 1964 to File Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on Behalf of Indigent Petitioner". In that document counsel took the position that, while this Court had erred in its decision, in the professional opinion of counsel the errors

are not of such character that the Supreme Court would grant a hearing. (United States Supreme Court Rule 19; Refusal, p. 3). However, counsel suggested that the document might be construed as a petition for certiorari as to the issue of counsel's obligation to file a petition, and that the merits of the issues on appeal should also be reviewed. (Refusal, pp. 2, 5).

Upon the filing of the Refusal, Mr. Justice Douglas, as Circuit Justice, extended the time for filing a petition for certiorari. At this stage of the proceedings, counsel was advised by the Clerk of the United States Supreme Court that the Refusal could not be construed as a petition for a writ of certiorari, since there was no judgment subject to review. (Letter dated December 20, 1968). No further action was taken by appellant or his counsel, and the extended time expired. Thereafter, the Supreme Court made its order of February 24, 1969, treating the Refusal as a petition, taking no action upon it as such, and remanding to this Court the question whether appellant's counsel is obligated to prepare and prosecute a petition for certiorari on the merits.

ARGUMENT

Summary

Appellant is entitled to the representation of counsel and to counsel's best efforts to obtain a reversal of his conviction. Since the instant proceedings are directed toward that objective, there is no conflict of interest between appellant and his counsel.

While the Constitution, applicable statute and rule, and the Ninth Circuit Judicial Council provisions for counsel on appeal all entitle appellant to representation, none of them entitles him to require counsel to file a petition for certiorari which counsel believes is unwarranted. The Judicial Council provision may not be construed to broaden the constitutional and statutory right to counsel, for to so construe it would render the provision invalid to that extent as ultra vires. The rules of *DOUGLAS vs. CALIFORNIA*, 372 U.S. 353, and *ANDERS vs. CALIFORNIA*, 386 U.S. 738, are not applicable to certiorari. Permitting counsel to refuse to file unwarranted petitions does not subject indigent appellants to unequal treatment. Requiring counsel to file such petitions would impair the judicial system by flooding the Supreme Court with them.

I

THERE IS NO CONFLICT OF INTEREST BETWEEN APPELLANT AND HIS COUNSEL IN THIS COURT, BECAUSE THE ULTIMATE OBJECTIVE OF BOTH IS REVIEW OF THE MERITS OF THE APPEAL BY THE UNITED STATES SUPREME COURT.

At the outset of the discussion it must be stressed that appellant's counsel does not seek to be relieved as such. Rather, we assert the right to remain as counsel and yet refuse to file a petition which we believe is not warranted. Since this stance is rife with the possibility of conflict of interest between appellant and counsel, we begin with an explanation as to why there is no conflict of interest as to the proceedings in this Court and how we propose to utilize the conflict in the Supreme Court to obtain a review of the merits of the appeal.

We fully recognize appellant's right to be represented by counsel at all stages of an appeal, including the determination whether a petition for certiorari is warranted and the filing of such a petition, if warranted. Moreover, we believe that it is the duty of counsel to use every ethical means to achieve the objectives of his client, even if the prospects of success are slight. However, it is the right and the duty

of counsel to determine strategy and means and to decide what steps are ethical. This right includes the authority of counsel to decide that nothing further can be done -- to refuse to file a petition for certiorari which he believes is unwarranted.

Appellant's objective is review and reversal of his conviction by the United States Supreme Court. We have embarked upon the present proceedings because we believe that they offer his best hope of achieving that objective. Therefore, there is no conflict between attorney and client as to the ultimate objective.

There also appears to be no conflict as to procedures to be adopted in this Court. We believe that the counsel issue was remanded to this Court because of the objection to treating the Refusal as a petition for certiorari raised in the Clerk's letter, viz., that there has been no judgment on that issue to be reviewed by the Supreme Court. In due course this Court will remedy that defect by ruling on the motion. Whichever way this Court rules, we intend to file a petition for certiorari from the ruling. Therefore, appellant should not be harmed by any ruling of this Court, so we are free to argue the merits of the motion without restriction due to conflict

of interest between appellant and counsel.

In the Supreme Court, the situation will be somewhat different. There, if the Court rules that counsel need not prepare and file a petition for certiorari on the merits, appellant may be out of court. Therefore, we cannot make an argument for such a result in that Court. In order to hear us on the counsel question, the Supreme Court must agree to review the merits of appellant's appeal. We intend to utilize this necessity to obtain review of appellant's conviction by the United States Supreme Court, which we believe could not be obtained in any other way. Whatever may be thought of the prospects of success of this strategy, we submit that it offers greater prospects of success than an ordinary petition for certiorari, and that it fulfills our obligation to appellant under the Sixth Amendment and otherwise.

II

THE EXTENT OF AN INDIGENT APPELLANT'S RIGHT TO REQUIRE HIS APPOINTED COUNSEL TO PREPARE AND FILE ON HIS BEHALF A PETITION FOR CERTIORARI IN THE UNITED STATES SUPREME COURT IS GOVERNED BY THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IMPLEMENTED BY THE CRIMINAL JUSTICE ACT OF 1964 AND RULE 44, FEDERAL RULES OF CRIMINAL PROCEDURE. PARAGRAPH 4(c) OF, "PROVISIONS FOR THE REPRESENTATION ON APPEAL OF DEFENDANTS FINANCIALLY UNABLE TO OBTAIN REPRESENTATION", ADOPTED BY THE JUDICIAL COUNCIL OF THE NINTH CIRCUIT, WAS NOT INTENDED TO BROADEN THE SCOPE OF THE CONSTITUTIONALLY CONFERRED RIGHT, AND THE JUDICIAL COUNCIL IS WITHOUT LEGISLATIVE AUTHORITY TO BROADEN IT.

Appellant's right to counsel has its foundation in the provisions of the Fifth and Sixth Amendments to the United States Constitution, implemented by the Criminal Justice Act of 1964, (United States Code, Title 18. Section 3006A), and Rule 44, Federal Rules of Criminal Procedure. However, before considering the scope of the right thus conferred, it is necessary to consider the significance for this case of Section 4(c) of the, "Provisions for the Representation on Appeal of Defendants Financially Unable to Obtain Representation", adopted by the Judicial Council of the Ninth Circuit, pursuant to the provisions of the Criminal Justice Act of 1964. That Section provides:

"(c) Certiorari. Following decision on appeal, if the appeal is unsuccessful, counsel appointed shall advise the defendant of his right to initiate a further review by the filing of a petition for certiorari, and, if requested to do so by the defendant, file such petition. If the defendant does not desire to seek certiorari, counsel shall file with the Clerk a statement to that effect, signed by counsel and the defendant. If the defendant refuses to sign, counsel shall so state." (Appendix to United States Court of Appeals for the Ninth Circuit Rules. 28 U.S.C.A., Court of Appeals Rules Volume, pp. 423-424).

The appeal was unsuccessful in this Court. Appellant did request his counsel to file a petition for certiorari. A literal interpretation of Section 4(c) suggests that counsel is bound to file such a petition, no matter what the constitution may require. However, for several reasons

the issue in the case at bar may not be disposed of upon such an interpretation of the rule.

In the first place, if literal interpretations are to be indulged in, the Supreme Court has construed the document filed by appellant's counsel as a petition for certiorari. Therefore, Section 4(c) has been literally complied with, and the only remaining question is whether the manner of compliance satisfies appellant's rights under the Fifth and Sixth Amendments to the United States Constitution.

A second, and we submit more reasonable, approach is to construe Section 4(c) in the light of its purpose and within the scope of the powers of the Judicial Council. The Provisions were adopted pursuant to the requirement of United States Code, Title 18, Section 3006A (a), requiring that the Judicial Council supplement District Court plans adopted under the Criminal Justice Act with provisions for the representation on appeal of defendants financially unable to obtain representation. The manifest purpose of Section 4(c) is to declare that representation on appeal includes responsibility for the filing or non-filing of petitions for certiorari and for advising appellants with regard thereto. The rule is intended to insure that this

responsibility is assumed by counsel and that an appellant's right to petition is not lost through inadvertence. So construed, Section 4(c) is a valid exercise of the authority conferred upon the Judicial Council by the Criminal Justice Act.

While the Judicial Council could properly insure that appellants are represented in connection with petitions for certiorari, it could not properly interfere with the manner in which counsel carry out that representation. No one would suggest that the Council has the power to say what issues counsel should raise in a petition for certiorari. It is doubtful that even the Congress has that power, and if it has, the Criminal Justice Act does not delegate the power to the Judicial Council. In a case in which counsel believes there is no issue which merits a grant of certiorari, a requirement that he nevertheless file a petition is in effect a dictate that he urge an unmeritorious ground. Section 4(c) should therefore be construed as requiring only that counsel file petitions for certiorari in cases in which they believe that such a petition is warranted. To construe the Section otherwise would render it invalid as beyond the scope of the power conferred upon the Judicial Council by the Congress.

III

APPELLANT MAY NOT REQUIRE HIS COUNSEL TO FILE A PETITION FOR CERTIORARI UPON GROUNDS WHICH IN THE OPINION OF COUNSEL DO NOT WARRANT A GRANT OF THE WRIT UNDER THE APPLICABLE SUPREME COURT RULE, BECAUSE SUCH A REQUIREMENT WOULD BE BEYOND THE SCOPE OF THE RIGHTS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS CONSTRUED BY THE UNITED STATES SUPREME COURT.

A. Relevant decisions.

In DOUGLAS vs. CALIFORNIA, 372 U.S. 353, the Supreme Court struck down, principally upon the ground of violation of the Equal Protection Clause, a California procedure pursuant to which:

"appellate courts should appoint counsel if in their opinion it would be helpful to the defendant or the court, and should deny the appointment of counsel only if in their judgment such appointment would be of no value to either the defendant or the court." (Page 355).

In so ruling the Supreme Court said:

"We are not here concerned with problems which might arise from the

denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with the first appeal granted as a matter of right to rich and poor alike (Cal. Penal Code §§ 1235, 1237), from a criminal conviction. We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeal had sustained his conviction (see Cal. Const., Art. VI, § 4(c); Cal. Rules on Appeal, Rules 28, 29), or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by appeal as

of right or by petition for a writ of certiorari which lies within the Court's discretion." (DOUGLAS vs. CALIFORNIA, 372 U.S. 353, 356).

In ANDERS vs. CALIFORNIA, 386 U.S. 738, the Supreme Court was confronted with the next step in the evolution of California procedure for providing counsel for indigent appellants. In ANDERS counsel was again appointed on a first appeal. Counsel concluded that there was no merit to the appeal and simply wrote a letter to the court to that effect. Appellant was permitted to file a brief pro se. The judgment was affirmed. The Supreme Court reversed. It concluded that counsel's bare conclusion, expressed in his letter, was not enough. The Court went on to state:

"We cannot say that there was a finding of frivolity by either of the California courts or that counsel acted in any greater capacity than merely as amicus curiae which was condemned in Ellis, supra. Hence California's procedure did not furnish petitioner with counsel

acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity." (ANDERS vs. CALIFORNIA, 386 U.S. 738, 743).

The Court continued: (Page 744, Footnote

omitted)

"The constitutional requirement of substantial equality and fair process can only be obtained where counsel acts in the role of an active advocate in behalf of his client as opposed to that of amicus curiae. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious

examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court -- not counsel -- then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal."

The case of *LANE vs. BROWN*, 372 U.S. 477, in-

volved a different but related subject. BROWN, an indigent defendant subject to a death sentence, brought a coram nobis proceeding, in which he was represented by the Public Defender, to attack his conviction. The proceeding was unsuccessful, and he sought to appeal. However, under Indiana law, he could not appeal unless he could obtain a transcript. Only the Public Defender could order a transcript at public expense. He refused. On federal habeas corpus the Supreme Court remanded the case for the making of appropriate orders requiring that BROWN be discharged, unless Indiana accorded him an appeal. The ruling was predicated upon the ground that:

"once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty. . ." (LANE vs. BROWN, 372 U.S. 477, 484).

The rule was expressly made applicable to collateral attacks. (Page 484).

The foregoing cases establish the following principles:

1. Every criminal appellant is entitled to

counsel on his first appeal.

2. That counsel must act as an advocate, not as amicus curiae.

3. Counsel's advocacy on a first appeal must culminate in a brief which says whatever there is to be said for appellant's case and assists the court in its own examination of the record.

4. Only if after such a procedure the court finds the appeal to be frivolous can the assistance of counsel be dispensed with.

5. The foregoing rules are not applicable to discretionary review after the first appeal.

6. Subsequent stages of appellate review may not be foreclosed on the ground of poverty.

B. An Appellant is entitled to counsel in determining whether to petition for certiorari, and in filing a petition with substantial merit, but he is not entitled to require counsel to file an unmeritorious petition.

The Supreme Court has made clear in DOUGLAS vs. CALIFORNIA, 372 U.S. 353, and ANDERS vs. CALIFORNIA, 386 U.S. 738, that the holdings in those cases do not entitle every appellant to have counsel file a petition for certiorari on his behalf. However, the line of cases

including LANE vs. BROWN, 372 U.S. 477, makes it equally clear that an appellant is not wholly without rights after losing the first round. There is a dearth of authority as to the rights of a person situated as is appellant in the case at bar. In the absence of authority, we shall attempt to construct a reasonable solution to the problem.

We begin with the principle of LANE vs. BROWN that an appellant may not be foreclosed on account of poverty. If an appellant could be set adrift without counsel upon affirmance of his conviction by a Court of Appeals, he could effectively be deprived of his right to petition for certiorari through ignorance. Therefore, it may fairly be concluded that appellate counsel must at least advise appellant of his right to petition and of any grounds for a petition. Moreover, if there are grounds, counsel must either file a petition or advise appellant as to the procedure for doing so. Though there is no clear authority, we submit that it should be held that if counsel finds grounds for a petition for writ of certiorari, he must either file or petition the Court of Appeals to appoint other counsel who will do so. Anything less would seem to deprive an appellant of the fairness and equal treatment which is the goal of such cases as ANDERS and

DOUGLAS.

We submit, however, that the foregoing reasoning does not entitle an appellant to a petition prepared by counsel in all cases. This conclusion is supported not only by the disclaimers of the Supreme Court in ANDERS and DOUGLAS, but by an examination of the differences between first and subsequent appeals.

DOUGLAS and ANDERS stand for the proposition that, for so long as appellant has a right to appeal, i.e., unless and until it has been established that the appeal is wholly frivolous, the appellant is entitled to the representation of counsel acting in the role of advocate. Once the right to appeal has been found by the court not to exist, however, the right to the services of an advocate ceases. Since certiorari is a discretionary writ to which no litigant has an absolute right, the right to the assistance of counsel in pursuing it is likewise not absolute.

The procedural obligations imposed upon counsel in ANDERS are designed to insure that the determination as to frivolousness of an appeal is made by the court, and it is an informed one which has been arrived at with the benefits of an advocate's presentation. The im-

position of these requirements is simply an application of the rule of *LANE vs. BROWN*, 372 U.S. 477, that no one but a court can divest appellant of his right to appeal and of the rule of *DOUGLAS and ANDERS* that, while the right to appeal exists, so does the right to counsel.

The procedural obligations imposed in *ANDERS* are not properly applicable to petitions for certiorari, because their purposes have already been served. On a first appeal the court is normally confronted with a voluminous record in which clues to potential appellate issues are buried. The first task of an advocate is to exhume those issues. However, that task could be performed objectively by a law clerk. The important function of an advocate is to approach the record from the point of view of the appellant, collect legal contentions supporting that view, and sell the appellate court on the validity of the view and of the correctness of the contentions. By the time an appeal reaches the stage of a petition for certiorari to the United States Supreme Court, counsel has fully performed these functions. He has acted in the role of advocate. The opinion of the appellate court will ordinarily reveal the issues. Appellant's viewpoint, if not revealed in the opinion, is at least available to the

Supreme Court in his briefs filed in the appellate court. The question, then, is whether an appellant has rights on certiorari additional to those which he possesses on appeal.

Additional functions performed by counsel in petitioning for a writ of certiorari include the formulation of the questions presented and the statement of reasons for granting the writ. Nothing stated here should be understood as denigrating the vital importance of these functions. However, ordering a lawyer to perform them is a far different matter from requiring him to prepare a statement of the case and summary of possible issues on appeal. (ANDERS vs. CALIFORNIA, 386 U.S. 738, 744). If a lawyer, after examining Rule 19 of the United States Supreme Court Rules, determines that he has nothing to say which is likely to persuade the Supreme Court to grant a petition for writ of certiorari, his professional judgment in that regard should be accepted. Nothing in either the Constitution or the applicable decisions suggests a contrary conclusion.

C. Permitting counsel to refuse to file a petition for certiorari which he believes is unwarranted does not subject an indigent to unequal treatment, because

ethical counsel do not file such petitions on behalf of paying clients.

Appellants may not be discriminated against upon the ground of poverty at any stage of an appeal. (LANE vs. BROWN, 372 U.S. 477, 484). Therefore, if appellants with ample funds may compel their attorneys to file petitions for certiorari which they deem unwarranted, then indigents must be given the same right. However, to assume that solvent appellants can obtain petitions deemed unwarranted by the lawyers who write them is to assume that, in general, the members of the Bar of the United States Supreme Court are prostitutes. On the contrary, ethical lawyers do not file petitions for certiorari which they believe are unwarranted. In fact, any inequality between indigents and paying clients favors the filing of petitions on behalf of indigents. The indigent has nothing to lose, while a most effective way of dissuading a paying client from proceeding in a marginal case is to first advise him of his chances and then fix the fee. In this context it may not reasonably be argued that indigents receive unequal treatment when they are not permitted to compel their attorneys to file petitions for certiorari which they consider unwarranted.

D. The assistance which counsel might render to the Supreme Court does not justify a rule requiring the filing of petitions for certiorari which counsel deem unwarranted.

Aside from the issue of the rights of appellant, there remains the question whether a rule requiring counsel to prepare all petitions for certiorari which appellants wish to file would not be of assistance to the Supreme Court in the performance of its arduous task. It is certainly easier for the Court to fully evaluate petitions prepared by counsel. However, we submit that the price at which such assistance to the Court might be obtained would be too high.

If the right to have counsel prepare unwarranted petitions for certiorari is to be accorded, it must be accorded on equal terms to all appellants, whether from state or federal courts. Nothing is easier than for an indigent appellant to say, "File". If such a rule were adopted, the inevitable result would be that sooner or later the Supreme Court would become so inundated with petitions that it would no longer be able to personally evaluate them. Such a result would be a grievous blow to our judicial system, and its most serious victims would be

criminal appellants with legitimate grounds for certiorari. We submit that, rather than adopt a rule which would encourage groundless petitions, it should be settled that counsel are, so far as constitutionally possible, permitted to control the litigation in which they are engaged. If they cannot be trusted to exercise their power of control with due regard for the rights of their clients, then they should not have been appointed in the first place.

CONCLUSION

For the foregoing reasons the motion of counsel to be relieved from perfecting and prosecuting a petition for a writ of certiorari in the Supreme Court of the United States from the judgment of this Court affirming appellant's conviction should be granted. The order granting the motion should specify that counsel is not relieved from representing appellant and is authorized and directed to take such further action in the case on appellant's behalf as counsel may deem warranted.

Respectfully submitted,

LANGFORD, LANGFORD & LANE

By J. Perry Langford

Attorneys for Appellant

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

EDWIN WALTER DUNLAP,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22,600 ✓

CARLTON COZZETTE PEAK,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22,600-A

On Appeal From the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

EDWARD E. DAVIS
United States Attorney
For the District of Arizona

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

FILED

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I.

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II ISSUES OF THE CASE

1. Was the issue of search and seizure of the two vehicles waived?
2. If not waived, was there probable cause for the search of the Triumph?
3. Was there probable cause for the arrest of Peak?
4. Was there sufficient evidence for the conviction of both appellants?

III JURISDICTIONAL STATEMENT OF FACTS

This case was begun in the United States District Court for the District of Arizona by the return of an Indictment by the Federal Grand Jury sitting at Tucson, Arizona, on September 13, 1966, charging in three counts, Edwin Walter Dunlap, Appellant herein, Richard Wayne Howard and Carlton Cozzette Peak, Appellant herein. (Transcript of Record, Volume I, pages 4 through 7. Hereinafter the first volume of the Transcript of Record will be referred to as "RC" and the Transcript of Testimony will be referred to as "RT" and the number following "RC" and "RT" will refer to the page and the number following "L" will refer to the line. Appellant Edwin Walter Dunlap will be referred to as Dunlap or Appellant Dunlap. Appellant Carlton Cozzette Peak will be referred to as Peak or Appellant Peak. Richard Wayne Howard will be referred to as Howard. Both Peak and Dunlap have filed separate appeals, but since they were tried together and have raised the same issues, the Government pursuant to Rule 28 (i), Federal Rules of Appellate Procedure, Title 28, U.S.C., is filing one reply brief.)

The Indictment charged in Count I a conspiracy commenc-

ing August 30, 1966 and continuing thereafter until on or about August 31, 1966, in the District of Arizona at Nogales, Arizona, and elsewhere between Dunlap, Richard Wayne Howard and Peak, and various other persons whose names were unknown to the Grand Jurors, to violate Sections 173, 174 and 176a of Title 21, United States Code, and that it was a part of the conspiracy that the defendants would fraudulently and knowingly smuggle and bring into the United States of America from and through Mexico three and three-fourths ($3\frac{3}{4}$) ounces of heroin and twenty-nine (29) pounds of marijuana, contrary to law; and that it was a further part of the conspiracy that they would wilfully and knowingly receive, conceal, buy and sell and facilitate the transportation, concealment and sale of three and three-fourth ($3\frac{3}{4}$) ounces of heroin and twenty-nine (29) pounds of marijuana, after the said heroin and marijuana had been smuggled and brought into the United States of America, contrary to law.

The Indictment charged, in Count II, Dunlap with a substantive violation of 21 U.S.C. §176a, of smuggling 29 pounds of marijuana.

The Indictment charged in Count III, Peak and Howard with a substantive violation of 21 U.S.C. §174, of smuggling three and three-fourths ($3\frac{3}{4}$) ounces of heroin (RC 6-7).

On September 26, 1966, Dunlap, Howard and Peak appeared in person and by their counsel, C. V. Worrell, Sr., and pleaded not guilty (RC 72).

On November 10, 1966, the Government filed a motion for trial setting (RC 9).

On November 23, 1966, Dunlap and Howard filed a waiver of their presence for the hearing of the motion (RC 11, 12), and the Court, on the representation of Government's counsel that April 11, 1967, was a date agreeable to defendants, set the case for April 11, 1967 (RC 72).

On March 21, 1967, all three, Dunlap, Howard and Peak, filed a Motion to Continue trial (RC 13, and an affidavit in support of the motion (RC 15-16).

On March 23, 1967, the Government filed its opposition to the Motion to continue trial (RC 18).

On March 27, 1967, a substitution of Harvey E. Byron for C. V. Worrell as attorney for Peak was filed (RC 19, 20).

On March 27, 1967, no appearance was made by the defendants or counsel, except Harold Warnock appeared for Harvey Byron, the Motion to continue was heard and denied (RC 74), and on March 29, 1967, a copy of the Minute Entry of the Order denying the continuance was mailed to all counsel (RC 74).

On April 10, 1967, a motion for continuance was again filed (RC 22), and on the same date was heard and granted (RC 74).

On April 20, 1967, the case was reset for trial on September 19, 1967, at 9:30 a.m. (RC 74), and on April 25, 1967, a notice of the trial setting was mailed to all counsel (RC 74).

On September 19, 1967, Howard failed to appear for trial (RC 74), Dunlap and Peak waived trial by jury (RC 27-28).

On September 19, 1967, trial commenced as to Dunlap and Peak before the United States District Judge James A. Walsh, sitting without a jury and on September 20, 1967, trial was completed (RC 74).

The Court found Dunlap and Peak guilty as charged in Count I, Dunlap guilty as charged in Count II and Peak guilty as charged in Count III (RT 241, L 3-9).

On October 5, 1967, Peak filed a motion for new trial (RC 73, 31-35).

On October 12, 1967, the Government filed its Memorandum in Opposition to Peak's Motion for New Trial (RC 73, 26).

After several continuances, judgment as to Dunlap was entered on October 30, 1967, and Dunlap was sentenced to five years on Counts I and II, sentences to run concurrently (RC 38).

On October 30, 1967, judgment was entered as to Peak, and Peak was sentenced to 7½ years on Counts I and III, sentences to run concurrently (RC 40).

On October 30, 1967, Dunlap and Peak both filed Notices of Appeal (RC 44, 58).

Bail on appeal for Dunlap was fixed at \$5,000 (RC 47, 48) and for Peak at \$10,000 (RC 59).

On October 31, 1967, Dunlap posted bond (RC 60-63).

On November 2, 1967, Peak posted bond (RC 68-71).

On April 17, 1968, the Trial Court entered an Order granting leave to Dunlap and Peak to prosecute appeal in forma pauperis.

The Trial Court had jurisdiction for the trial of the offense by the provisions of 18 U.S.C. §3231. This Court has jurisdiction of the appeal by the provisions of 28 U.S.C. §1291.

Statement of Facts

On August 30, 1966, at about 9:00 a.m., Customs Port Investigator, Everett H. Turner, Customs Agents Henry H. Washington and James B. Anderson were in the Coronado Motel Coffee Shop, which is located on Grande Avenue, State Highway 89, in Nogales, Arizona, about one to one and one-half miles north of the International Border (RT 12-13; 88; 122). Their attention was caught by Howard and Peak who

were seated at another table (RT 12). Turner's attention was drawn to them because their clothes were disheveled and they were unshaven, and since there were only four families of colored people, they were immediately noticeable as strangers (RT 51).

Turner and Washington saw Howard get up from the table in the direction of the pay phone; Howard stayed there about 3 to 5 minutes and on returning to the table, Howard raised his right hand, touched his forefinger to his thumb with the other three fingers upraised, "an OK sign" (RT 13-14; 123).

Shortly thereafter the Agents left, but Turner returned and checked with the Coronado Motel manager and was shown Government's exhibit 1—Howard's motel registration in the name of Carl Anderson (RT 14; 122). The manager, Joe Crevolone, pointed out a 1965 Buick Riviera coupe, white in color with California plates (RT 14).

Turner returned to the office and ran a record check on the license plate (RT 15). Turner returned to the Motel and was shown Government's exhibit 6 (RT 72) and had a black 1965 Triumph pointed out to him (RT 15). Turner then ran a license check on the Triumph (RT 15, L 20).

Shortly thereafter, Turner set up a surveillance across the street from the Coronado in the Colonial House parking lot (RT 15, L 22-25).

From approximately 11:00 a.m. to noon, Turner remained there until he moved into room number 6 at the Coronado, joining Agents Anderson and Washington there (RT 16, L 3-10).

Anderson observed Dunlap leave his room about 3:00 p.m., walk back and forth several times and re-enter his room (RT 91).

Around 4:00 p.m. Peak and Howard left their motel room and entered the Buick and drove off. Turner followed them into Mexico where they had parked the Buick near Elvira's Restaurant, near the International Fence in Mexico (RT 16). Peak and Howard were at the opposite end of the block talking to a taxi driver for about five minutes (RT 16). They appeared to enter the restaurant and were there one-half hour (RT 16).

Peak and Howard then entered the Buick and then drove south approximately a mile and a half, near the bull ring (RT 17). The Buick was parked and Howard and Peak were seated in a car parked immediately behind it talking to Roberto Sanchez, a known narcotics dealer in Nogales, Sonora, Mexico (RT 17).

Turner returned to the port of entry and saw Peak and Howard re-enter the United States in the Buick about three hours later at 8:00 p.m. (RT 17).

Inspector Charles Bigelow took Peak and Howard's entry (RT 144). They declared liquor (RT 144).

Peak and Howard returned to the Motel and presumably entered their room (RT 17). Shortly thereafter Dunlap left his room and entered Peak and Howard's room (RT 93).

Anderson then left the motel and went and obtained another car which was unmarked but had a radio in it under the dashboard (RT 93). Peak and Howard came out, walked around, and Howard looked into the Government car and then returned to the miniature golf course at the motel (RT 94).

At approximately 10:30 p.m., Howard left in the Buick, followed by Agent Anderson (RT 17).

Howard drove south on Grande to Plum Street, turned left off Plum Street to Encina, and then left on Walnut and stopped in the middle of the block (RT 94). At this point, Anderson

discontinued surveillance and returned to the motel room (RT 94).

At about 11:00 p.m. Dunlap removed two suitcases from room number 7 and walked over to Peak and Howard's room and set the suitcases on the front porch (RT 94, L 24 to 95, L 4).

At about 12:00 to 12:45, Dunlap and Peak left in the Triumph (RT 17; 95) with Dunlap driving (RT 94). Anderson followed them south on Grande to Crawford, which is two blocks north of the Border (RT 94), and then went to the end of Crawford, made a U-turn and at that point discontinued the surveillance (RT 95) because there were too few cars on the street (RT 113, L 2-4). Anderson returned to the room (RT 95).

Turner, who was watching Morley and Grande Avenues from the V.F.W. parking lot, and Anderson from the room, saw the Triumph return first and then the Buick returned at about 1:00 a.m. (RT 18; 95).

At about 1:30 a.m., Peak and Howard left in the Triumph and no agent followed it (RT 18; 95).

At about 2:00 a.m. they returned and Peak and Howard got out of the car, opened the trunk and removed something white from it (RT 18).

Dunlap then started putting things in the Triumph and left headed north (RT 18) at a pretty good rate of speed (RT 168, L 1-3). Turner radioed Agents Washington and Cameron (RT 18). Washington had been in communication with Turner and Anderson all day (RT 124, L 5-12). Cameron joined him around 7:00 p.m. (RT 124, L 3-4).

Washington used his siren and red-light to stop Dunlap (RT 125, L 23-24). Cameron informed him they were Federal Agents, advised him as to his rights, and that they were

going to search the car for contraband, and if they found any contraband in his car that he would be placed under arrest (RT 166). Washington searched the car and found in the trunk two gunny sacks or burlap bags, Government's exhibits 7 and 8 (RT 127-128).

(Both Howard and Dunlap's attorneys stipulated chain of custody for Exhibit 7 and 8, as well as Exhibit 3, and that Exhibit 3 contained the heroin, 3.37 ounces, 66.6% pure, that exhibit 7 and 8 contained 20 bricks of marijuana which weighed a total of 29 pounds, RT 147-149. They stipulated further that Exhibit 3 was the substance Anderson took from the Buick, RT 148, L 11-19, as testified to by Anderson, RT 97, L 1-20. Exhibit 3 was wrapped in a wet towel and was inside exhibit 2, RT 98. Also found in exhibit 2 was a loaded .45 automatic pistol, and Howard's billfold, RT 98, L 22-23. Exhibits 7 and 8 were wet, RT 127, L 15.)

Washington radioed Turner he was waking up the Commissioner to obtain a warrant for the arrest of Howard and Peak, and a search warrant for the Buick (RT 140-141; 19). He never executed the warrant because the Buick started to leave with Howard and Peak at about 4:00 a.m. and Turner and Anderson stopped them and arrested them for smuggling and conspiracy on the marijuana (RT 121, L 6-9). Anderson found Government's exhibit 2, the blue Pan-American flight bag containing Government's Exhibit 3, the 3.35 ounces of heroin, on the right front floor board (RT 20-21), the passenger side, where Peak was seated (RT 81, L 7-8). Howard was the driver (RT 81, L 9-10). Binoculars were found on the back seat floor board (RT 81, L 11-14).

Wet clothing, pants, socks and shoes, were also found on the back floorboard (RT 81, L 24 to 82, L 1). On the evening of August 30 and the early morning of August 31, 1966, the vicinity of the International Boundary was wet with standing water (RT 99, L 15-20).

The Government rested (RT 168, L 22 to 169, L 4).

Dunlap testified he had a football scholarship to the University of New Mexico, obtained by his brother-in-law, Howard (RT 186-187).

Prior to leaving Los Angeles for the University, his brother-in-law offered to meet him in Nogales with some young ladies to have a party (RT 187).

Dunlap arrived at the motel, registered, went to his room called his brother-in-law who was asleep (RT 188). Dunlap went to sleep and when he got up, the car of his brother-in-law was gone (RT 189). He walked around the motel, etc., and went back to his room (RT 189). At 8:00 p.m. he went over to their room and spent the rest of the evening there (RT 190). They discussed the girls and the trouble with his, Dunlap's, car (RT 190).

Howard drove it (RT 193) and then he and Peak drove it to check it out (RT 193). Since the girls weren't there he was anxious to get back to school (RT 195, L 3-5). Dunlap described being stopped and admitted he was nervous, but he was nervous because he said Washington pulled a gun on him (RT 198). Washington, the case-in-chief, denied having drawn his gun (RT 132, L 15-20). Then Cameron put the gun to his head (RT 199), which Cameron did not (RT 166-167). Cameron described Dunlap as not being able to stay put, and when Cameron saw Dunlap lean into his car and put his hand on something shiny, Cameron drew his gun, but he didn't believe Dunlap saw it (RT 166-167).

Dunlap was surprised to see the sacks and had not seen them before (RT 200).

On cross-examination he testified the Triumph was registered to Steve Morris, his other brother-in-law (RT 204).

He denied that when he replaced his suitcases at the motel that the trunk was opened or closed by him (RT 206, L 7-22).

He did not know why his brother-in-law registered as Carl Anderson, Deming, New Mexico (see Government's exhibit 1, RT 207-208).

Peak's attorney then cross-examined Dunlap (RT 212-213). Dunlap was not aware that Peak would accompany his brother-in-law Howard to New Mexico (RT 212-213). Dunlap knew Howard was a member of the United States Olympic team (RT 213).

On re-direct he stated Howard registered under assumed names so he wouldn't be bothered by ticket hustlers, things of that nature (RT 214, L 6-17).

On re-cross examination by the Government, Dunlap admitted he had stated on cross-examination he didn't know why Howard registered as Anderson (RT 216).

Dunlap rested (RT 216, L 15), Peak then rested (RT 216, L 16-17).

The Government recalled Turner in rebuttal, who testified that he saw Dunlap close the trunk of the Triumph, Howard open the trunk and Peak remove the white object (RT 217-218). Dunlap stated on cross examination the bags he denied ever seeing before were quite visible (RT 210-211, L 8).

Washington denied asking Dunlap when he stopped him, "Where are the girls?" (RT 220, L 24 to 225, L 1). Washington denied asking, "What money do you have?" (RT 221 L 2-4).

Washington testified the Buick was parked at the motel the afternoon before while Dunlap was walking up and down; the Buick did not leave until one hour to one hour and a half

later (RT 222, L12 to 223, L 1) contrary to Dunlap's testimony that the Buick was gone (RT 189, L 10-11).

Cameron said only one car was on the highway when he and Washington stopped the Triumph and that was after the Triumph was stopped (RT 232, L 24-25), and the car that passed was the car that almost hit Washington (RT 234, L 13-15), as Washington had testified to (RT 133, L 7-8).

Anderson was recalled and testified that in the two surveillances he did, first with Howard there were a few cars on the street (RT 237, L 7-16), when he followed the Triumph to Crawford he saw only one other car (RT 236, L 16-22).

Dunlap took the stand on surrebuttal and the Government objected to materiality and was sustained (RT 238, L 23 to 239, L 4).

The Government waived argument and Peak and Dunlap's counsel argued (RT 240). The Court reserved ruling to 1:30 p.m. (RT 240). At 1:30 p.m. the Court made findings and found Dunlap guilty as charged in Counts I and II and Peak guilty as charged in Counts I and III.

IV. SUMMARY OF ARGUMENT

1. Peak and Howard having retained counsel for twelve months prior to trial, and having failed to bring a Motion to Suppress prior to trial, and having failed to show adequate grounds as to why they did not, had waived objections to the search and seizure; and if not waived there was probable cause for the search of the Triumph, and probable cause for the arrest of Peak and the Search of the Buick was a lawful search incident to arrest.

2. There was sufficient evidence to find Dunlap and Peak guilty.

V. ARGUMENT

1. Peak and Howard having retained counsel for twelve months prior to trial, and having failed to bring a Motion to Suppress prior to trial and having failed to show adequate grounds as to why they did not, had waived objections to the search and seizure; and if not waived, there was probable cause for the search of the Triumph, and probable cause for the arrest of Peak and the search of the Buick was a lawful search incident to arrest.

When the Government offered the contraband, Government's exhibits 3, 7 and 8, into evidence, Dunlap's counsel and Peak's counsel objected (RT 149-152; 152-156).

The Court stated:

"THE COURT: Well, to begin with, here is a case where there is no motion. The case has been pending since—

"MISS DIAMOS: September 13th.

"THE COURT: — September, over a year. There has been no Motion to Suppress filed in the case in accordance with Rule 41. There has been nothing done to attack the search or the seizure up to this very minute when we are in the evidence as actually offered after all of the testimony regarding foundation is received. I strongly feel that under the cases, the objection to the evidence has been waived. This is certainly no open and shut case, as far as legality of the search is concerned. In fact, I am inclined to think, on considering the evidence — in fact, I find that the search and the seizure of the marijuana in the Triumph was a valid one. I think counsel sees with rose colored glasses here a little bit. In the first place, we must start with the proposition that Nogales, Arizona — and the Court can judicially notice this because of the fact that it

has observed here in recent events, that about all the trial business the Court has is prosecution for endeavors to bring narcotics from Mexico into the United States at Nogales. In fact, Nogales — the Court judicially notices that is one of the leading, if not the leading foreign avenues for getting narcotics from Mexico into the United States. So we are not talking about the border up near Montreal or up near Washington, we are talking about Nogales, Arizona, with that being the facts as to the character of the narcotics traffic in the vicinity of Nogales. We do have, in the testimony, the fact that Mr. Peak and Mr. Howard are seen in the afternoon of August 30th at Nogales, Sonora, over in Mexico, in consultation with a known narcotics trafficker on that side of the border. That establishes a contact with narcotics, this contact with a known narcotics peddler. Mr. Dunlap is at the motel, as are Mr. Peak and Mr. Howard, but they avoid each other for a period of time, in fact up until after 8:00 o'clock in the evening; and then Mr. Dunlap begins to associate and to meet and to consort with Mr. Peak and Mr. Howard. Then begin the departures from the motel and coming back: Mr. Howard leaves about 10:00 o'clock in the Buick, he drives around Nogales to some extent, and at midnight Mr. Peak and Mr. Dunlap leave in the Triumph; they drive around Nogales a little while and they come back, and at 1:00 A.M. — the Triumph and the Buick get back almost simultaneously, they departed some time apart, but they come back almost together. At 1:30 then Mr. Peak and Mr. Howard go off and not in the Buick which they had originally, but they take Mr. Dunlap's automobile, which this is not an occasion of just a casual acquaintance of these people. You have got the occasion then, for sure, of being together in this association all through the night, you have got them using automobiles interchangeably. About 2:00 o'clock Peak and Howard come back with the Triumph — 2:00 o'clock in the morning. They come back with the Triumph, they take something out of it and he takes off away from Nogales. This coming and going has gone on ever since, and the association has gone on ever since they came back from being in Nogales with the nar-

cotics peddler. They leave and come back. But the point is, they registered in that motel on the 30th, and the agents had them under observation more or less from 9:00 o'clock in the morning or so, and they are seen separately and together, they are around the place, they are coming, they are going, and this keeps on through 8:00 to 10:00 to midnight to 2:00 o'clock. They register in the motel, and then all of a sudden, after all this nocturnal activity, Mr. Dunlap suddenly decides to leave the motel and takes off, which is conduct a little bit unusual with a person who registered for a motel in the morning and spends the day kicking around and takes off without ever using the room to sleep in. Another suspicious circumstance. These things are known to the agents, all of these things taken together collectively, and I believe that on the basis of what the agents knew, I find that the search and the seizure in the Triumph was made upon probable cause, that is that it was made upon a belief on the part of Mr. Cameron and Mr. Washington reasonably arising out of the circumstances that were known to them, that the Triumph contained contraband, which under the law was then subject to seizure and destruction. On that basis, that seizure and the arrest of Mr. Dunlap was lawful; and that when that information was transmitted as to the search and the seizure, and the result was transmitted to Mr. Anderson and Mr. Turner, and when Mr. Peak and Mr. Howard began to depart before a warrant could be obtained for a search of their room and a search of their vehicle, those officers had probable cause to arrest Mr. Peak and Mr. Howard as participants. And I think the whole area of conduct showed a cooperative effort of all these people all through the day and through the night, and the officers were justified in arresting Mr. Peak and Mr. Howard on the charges of conspiring to smuggle marijuana and smuggling marijuana into the United States; and therefore the search of the Buick and the seizure of the substance that has been identified as heroin were also lawful.

"MR. WORRELL: Would the Court permit any further discussion of the motion?

"THE COURT: Oh, yes." (RT 156, L 17 to 160, L 12).

Worrell argued and the Court pointed out the evidence (RT 160-164).

The Court found:

"THE COURT: Well, the failure of the officers to just get right on them and stay with them every minute—you say they broke off the surveillance and just followed them part way. At that hour in Nogales and with people engaged in that business, they didn't dare identify themselves as being in close pursuit, but very definitely when there is this maneuvering and then in the middle of the wee hours of the morning after the cars have come and gone, the Buick and the Triumph, and then back together, and then the Triumph again with a different driver; when they come back, and in fifteen minutes Mr. Dunlap is in the car and he is headed north, I think the officers are more or less justified in believing, in view of that, that that strange conduct at that hour of the morning, that probably the merchandise is there." (RT 164, L 12-25).

As was stated in *Sandez vs. United States* (9th Cir., 1956) 239 F.2d 239 at page 242:

"[3] Further, had there been any *question of illegal search, the obligation was upon the defendant to move to suppress the evidence after indictment.* *Weeks vs. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652. *Price vs. Johnston*, 9 Cir., 125 F.2d 806, certiorari denied 316 U.S. 677, 62 S.Ct. 1106, 86 L.Ed. 1750.

"*Failing to make such a motion, he has waived his objection,* *Segurola vs. United States*, 275 U.S. 106, 48 S.Ct. 77, 72 L.Ed. 186, *unless there exist extenuating circumstances,* *Agnello vs. United States*, 296 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145." (emphasis supplied).

Also, as was stated in *Santoro vs. United States* (9th Cir., 1967) 388 F.2d 113 at page 114:

"Appellant contends that Government Exhibits 7, 8, 9 and 10 were erroneously admitted into evidence. Appellant argues that the items were seized pursuant to an arrest which was unlawful because made without a warrant and without probable cause. No motion to suppress within Rule 41 (e), Fed. R. Crim. P. was made prior to trial; and the government contends that appellant's motion to strike was inadequate. The facts of this case, however, make it unnecessary to decide the question of the legality of the arrest."

As was stated in *Bell vs. United States* (9th Cir., 1967) 382 F.2d 985 at page 986 to 987.

". . . Prior to the trial, there had been no motion to suppress evidence as required by Rule 41(e), Federal Rules of Criminal Procedure. Although some may believe that judges ought to be endowed with prescient powers, none has yet suggested that they must be mind readers.

"Moreover, assuming that the obscure request should have been treated as a motion to suppress, there was nothing in Officer Goetzke's testimony which should have been suppressed. Essentially, he testified to nothing more than that he stopped the automobile and observed the appellant therein. *If there is a question as to whether or not there existed probable cause for the stopping of the automobile, it was impliedly resolved in favor of the Government. . . .*" (emphasis supplied.)

See also *United States vs. Paradise* (3rd Cir., 1964) 334 F.2d 748, where that Circuit held denial of motion to suppress made at trial was proper exercise of discretion when defendant had been represented by counsel fourteen months prior to trial.

The Court, however, in finding Dunlap and Peak had waived, did make findings that there was probable cause to stop and search the Triumph.

Title 19, U.S.C. §482, provides:

"Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast,

or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, *in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law*; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial. R.S. § 3061.” (emphasis supplied).

In *Bailey vs. United States* (5th Cir., 1967) 386 F.2d 1 at pages 2-3, the Fifth Circuit held:

“As this was a warrantless search not incident to an arrest, the government either must have a finding that probable cause existed or must excuse its absence by resort to the border search doctrine. No case has held that one who has not crossed an international boundary can be the object of a constitutionally permissible border search, and we do not reach that question. Rather, we assume the view of the searching officers, and hold that ‘the fact and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief’ that appellants were, when searched, possessed of illegal narcotics.”

Thereafter, when Washington and Cameron were with the Commissioner, getting arrest warrants and a search warrant, Howard and Peak attempted to leave and Anderson and Turner stopped them and arrested them for conspiracy to smuggle marijuana.

Furthermore, as was stated by Government’s counsel in

resting on the Government's case in chief:

"MISS DIAMOS: I have nothing further, Your Honor, and the Government rests.

"In resting, I would like to point out, for the record, that regardless of what Mr. Worrell might have thought how this case might have begun, if a motion had been filed the Government would have probably had to produce more facts, which would be in our case in chief, and I would just like to state that for the record.

"MR. WORRELL: Your Honor, I feel that is an improper statement for the record. With all due deference and respect to Miss Diamos, the Court has ruled on a motion, and I think a deliberate attempt to tell the Court that she had additional facts that she could have brought, because the Court has ruled against us and there is no reason for her to say that she's got more evidence.

"THE COURT: Mr. Worrell, I think it may be in order, the rule applies that a person complaining of an unlawful search and seizure may move the District Court, in the District in which the property was seized, for the return of the property and move for suppression of the evidence on the ground, 1, that the property was illegally seized without warrant or, 2, the warrant is insufficient on its face or, 3, the property seized is not that described in the warrant or that there was not probable cause for believing the existence of the grounds on which the warrant was issued; and 5, the warrant was illegally executed. Of course, the first grounds would not be pertinent here.

"The Judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the

Court in its discretion may entertain the motion at the trial or hearing.' I believe that in the light of the rule, the motion should have been made before trial or there should have been advice given to the Court and of course the United States Attorney, and leave should have been asked to have the motion made on the trial. And in the absence of the motion or notice that the motion was to be made on the trial, *I think the Government has the right to rely on the fact that there was going to be no motion, and the evidence which might have been produced on suppression, that there was probable cause and reasonable grounds that some of that would not be brought here today on the question of guilt or innocence.*

"The failure to get leave or make the motion affected the Government's showing." (emphasis supplied). (RT 168, L 22 to 170, L 20).

"The Government was stopped from going into the conversations of the agents (RT 15, L9-10). The Government, on a hearing of a motion to suppress could have shown what Turner and the agents knew about the taxi stand that Howard and Peak parked by and were then seen talking to one of its drivers (RT 16) and the man in whose car they were sitting near the bull ring, Roberto Sanchez (RT, i.e., Sanchez owned that taxi service). Further, that when Turner checked the registration on the Buick the Government could have shown it was a rented car (RT 15, L 1-2). As was shown when Turner checked the Triumph registration it was not registered in the name of Dunlap (RT 76, L 2-3). Further, that the area of Nogales Howard headed into and then Dunlap and Peak headed into are known drop points along the Internal Boundary, i.e., that contraband is picked up through holes along the fence near Crawford Street, et cetera.

It is respectfully submitted there was a waiver to the objections, if any, of the search and seizure by both Dunlap and Peak.

2. There was sufficient evidence to find Dunlap and Peak guilty.

Peak did not rest until after Dunlap testified (RT 216) and did cross-examine Dunlap (RT 212).

As the Court found:

“AFTERNOON SESSION

“1:30 O’CLOCK P.M.

“THE COURT: In the case of the defendants Edwin Walter Dunlap and Carlton Cozzette Peak, the Court find both defendants guilty as charged in Count 1, the conspiracy count; finds the defendant Edwin Walter Dunlap guilty as charged in Count 2 of the Indictment, and finds the defendant Carlton Cozzette Peak guilty as charged in Count 3 of the Indictment.

“I think I should say, in the light of the testimony of Mr. Dunlap, that that evidence — his evidence more or less strengthened the Court’s finding of guilt in the case. I simply find the explanation beyond belief. In other words, these people are down at Nogales, they don’t live there, they don’t have any interest there except they are going to meet some girls. What girls? We are given that, just that statement: Some girls were going to come. No explanation whatever about who, what girls. The girls never come, there are no girls. They are there from the morning on the 30th until the wee small hours of August 31st; and, on the basis of the testimony, the Triumph has some mechanical difficulty with it, which the defendants — in the first place, it’s not Mr. Dunlap’s automobile. It is, according to the defendants, registered to a man named Phillips — one says it’s either the emergency brake or the transmission, could be the emergency brake, but anyway at midnight Mr. Peak and Mr. Dunlap go out and try the car out for mechanical difficulty, which they are gone an hour, which just, at that hour of the night, doesn’t make much sense. Then, when they return at about 1:30, then Mr. Peak and Mr. Howard go out and try it out without Mr. Dunlap who is the one who is interested in the car and

what someone else may think of it, but then Mr. Peak and Mr. Howard go out and try it out. They get back at 2:15. Mr. Dunlap decides not to wait and have it fixed, if there be anything the matter with the car, but without waiting, he takes off at that hour of the morning headed back to school; all of a sudden he is in a great hurry. No explanation of why the girls didn't show or whether or not they were supposed to be there. It's too nebulous, and actually strengthens the Government's case, in my belief." (RT 241, L 1 to 242, L 16).

Dunlap in arguing the sufficiency of the evidence cites *Miller vs. United States* (9th Cir., 1967) 382 F.2d 583, for the point there was no knowledge shown on Joseph's part by the Government.

Evidence on appeal shall be construed in the light most favorable to the Government. *Thrasher vs. United States* (9th Cir., 1968) 394 F.2d 506 at 507.

Dunlap denied ever looking into the trunk of the Triumph or closing it, although he did admit the burlap bags were readily visible. Turner saw him close it. There was evidence from which the Court could find knowledge. Furthermore, the Court found his story "beyond belief" (RT 241, L 13).

With regard to Peak's argument, Peak argues that at no time did Anderson or Turner testify that Government's exhibit 3, the heroin, was in the Pan American flight bag found on the side Peak was seated (page 8 of Peak's opening Brief). Peak overlooks the testimony of Anderson, page 97 of the Transcript of Testimony, lines 1 through 20.

Peak's case included Dunlap's defense. Dunlap brought out conversations about Peak being in Nogales because he had to see his wife in Tucson, and Peak drove first with Dunlap and then with Howard to test the car, but which the Court found, were trips to the drop point by the fence to pick up the marijuana and heroin which was finally done by Howard and

Peak. Peak took the white object out of the trunk of the Triumph and entered the motel room. Government's exhibit 3 was found wrapped in a white towel.

As was stated in *Mott vs. United States* (9th Cir., 1967) 387 F.2d 610, at page 612:

"[1-3] Conspiracy may be and, frequently is, proved by circumstantial evidence. It can rarely be proved in any other manner. *Diaz-Rosendo vs. United States*, 357 F.2d 129 (9th Cir. 1966) (en banc); *Isaacs vs. United States*, 301 F.2d 706 (8th Cir. 1962). In determining whether or not the evidence is sufficient to sustain the judgment of conviction we must view the evidence in the light most favorable to the prosecution. *Glasser vs. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Diaz-Rosendo vs. United States*, supra. Viewing the evidence in this light we find that there was sufficient evidence, direct and circumstantial, to support the conviction."

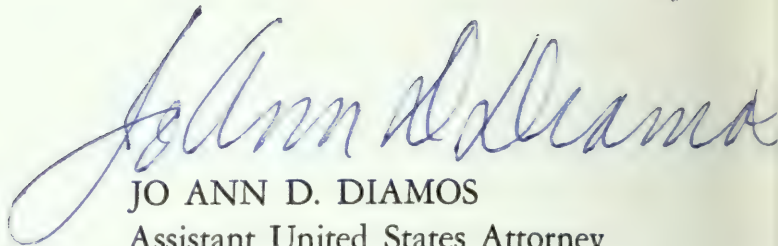
The trip in the Triumph with Howard, the explanation he is in Nogales, Arizona, to see his wife in Tucson, the removing of the "white object" from the Triumph by Peak is, it is respectfully submitted, direct and circumstantial evidence of his knowing participation in the conspiracy.

VI. CONCLUSION

It is respectfully submitted Dunlap and Peak had waived their objections to the search and seizure and that there was sufficient evidence to find them guilty as charged.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

COLONEL FRANK CHILDS AND
ELIZABETH CHILDS, HUSBAND AND WIFE, ET AL.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES, APPELLANT

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FILED

MAY 29 1968

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IN THE UNITED STATES COURT OF APPEALS
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No. 22601

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES, APPELLANT

OPINION BELOW

The district court did not write an opinion. Its findings of fact and conclusions of law are found at pages 405-417 of the record.

JURISDICTION

Jurisdiction was invoked by the United States in the district court under 28 U.S.C. sec. 1345 (R. 258). Judgment was entered on September 25, 1967 (R. 418). Notice of appeal was filed on November 15, 1967 (R. 419). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether a deed to the United States in trust for an Indian tribe may be declared invalid for failure of consideration.
2. Whether fulfilling the purposes of a trust is sufficient consideration for a deed to the United States as trustee for an Indian tribe.
3. Whether an executed contract may be modified or set aside on the basis of the unexpressed alleged intent of one of the parties.
4. Whether a trust may be revoked where no power to revoke has been reserved in the trust instrument.
5. Whether a trust is revoked by a standard residual clause in the settlor's will.

STATEMENT

On January 24, 1964, the United States brought this action at the request of the Papago Indian Tribe to quiet title to 640 acres of land in Pima County, Arizona, which had been conveyed in 1947 to the United States in trust for the Papago Tribe by Thomas Childs, Jr. (a white man), and his wife, Mrs. Childs (an Indian), reserving life estates in the grantors. ^{1/}

^{1/} Mr. Childs also had preference rights (now revocable permits) to 300,000 acres of Taylor Grazing Act land, based on ownership of the 640 acres.

The children have maintained that they inherited fee title to the property under a subsequent will.

Childs was married to a Papago Indian and had 12 children. The evidence shows, and the court found, that Childs was "an intelligent self-educated individual" (R. 412). He had built a ranching empire and was a recognized expert on mining, serving as a consultant on mining to various individuals, including members of the faculty of the University of Arizona. He was well-read and had even developed considerable knowledge about medicine (R. 428, Deposition of Jack R. Terry, pp. 51-52; Tr. 119-120). Besides managing the ranch, he had been involved in numerous enterprises, such as "pioneering the fishing and hauling of fish from the Gulf, Rocky Point, and also he has explored, operated numerous mines in Yuma County. In Maricopa County, and in Pima County, too" (R. 428, Terry Dep., p. 51). He had sold his interest in one mine for \$150,000 (R. 428, Terry Dep., pp. 52-53). He had also operated a grocery store and had engaged in large scale buying and selling of cattle (R. 428, Terry Dep., p. 51).

At the trial, there was testimony to the effect that in 1947, four years before his death, Childs felt that it was time to settle the disposition of his property. He was concerned that at his death his children would not be able to manage his

ranch (Tr. 37, 122, 236, 381). His sons had had severe problems with alcohol since 1941 (R. 428, Terry Dep., p. 13) and had not been given much responsibility in managing the ranch (R. 426, Deposition of Gordon Alley, p. 14; Tr. 273). He "was afraid that they would throw it away, drink it up, and that they had no business ability about them, and he was very much concerned which one he would put in charge. * * * he had no faith in their judgment and their drinking problem was getting bad, at that time" (R. 428, Terry Dep., pp. 16-17). He was "very much concerned with the boys doing away with the property, and being paupers * * *" (R. 428, Terry Dep., p. 18). He expressed his concern to numerous individuals, including representatives of the Bureau of Indian Affairs (Tr. 37, 236, 381).

Childs consulted a lawyer about making arrangements to secure the property against mismanagement and insure that his children and his descendants would get the benefits forever. He was informed that this arrangement was impossible (R. 411).

Since he was unable to establish what amounted to a trust in perpetuity, Childs sought an alternative disposition of his property that would protect his descendants and looked for help in accomplishing this goal from representatives of the Bureau of Indian Affairs. Childs informed them that he would like for them to (Tr. 36-37):

help him make out a Will or whatever was necessary in order to turn his property over to the Papago Tribe and that in order to do this he wanted to attain one very important thing, and that was that his children would have full rights to those lands for as long as they lived * * *. But in the meantime would pay the taxes and see that the lands would not be lost and that his children would always have then through their lives a place to live and do whatever they wished on * * *.

See also Tr. 60.

When asked what he wanted in regard to his grandchildren, he stated (Tr. 37, 383):

as far as he was concerned, * * * they would become then members of the Papago Tribe.
* * * And they would have all rights to that land and other lands of the Papago like any other Papago individual. But that his one great concern was that his children would have that land for a first right on it for as long as each and every one of them lived.
* * *

* * * * *

[H]e wanted not only to preserve it for the children; if his children did not use it, at least for Papagos because of his love for Papagos. * * *

See also Tr. 60.

The local officials consulted with a Mr. Sanford, then Regional Solicitor of the Bureau of Indian Affairs in Phoenix, Arizona, who, in accordance with Mr. Childs' request, prepared an offer to sell his property to the United States in trust for the Papago Tribe pursuant to 25 U.S.C. sec. 465, reserving a life estate in the Childs, and providing, insofar as is relevant here (Tr. 396, Def. Ex. C):

4. The acceptance of this offer is contingent upon the enrollment of the grantors' children as members of the Papago Tribe.

5. As part of the consideration of this conveyance it is understood and agreed that the children of the grantors shall be granted a preferential right of assignment of the use of the buildings and existing improvements located on the lands described herein.

6. Descendants of prior deceased children of the grantors shall be enrolled as members of the Papago Tribe provided that they are one half or more degree of Papago blood.

As the court found (R. 410, Fdg. VI):

The children of Thomas Childs, Jr., defendants in this action, have continued to use, possess, receive the income from, and reside on the subject property and the Childs' Federal Grazing Allotment since February 2, 1951, the date of the death of Thomas Childs, Jr. until the present time.

Sanford explained these provisions to Mr. and Mrs.

Childs and on the same day the Childs signed the offer (Tr. 386). The offer was accepted by a resolution of the Papago Tribe (Def. Ex. B, Tr. 335) and, shortly thereafter in 1947, the Childs executed a warranty deed to "the said United States of America in trust for the Papago Tribe, Arizona and its assigns forever" (Def. Ex. A, Tr. 31).

Witnesses for appellees testified that shortly after his death in 1951, conditions in Childs' family seemed to have changed. Childs' son, Colonel Frank Childs, temporarily stopped

drinking (R. 427, Deposition of Alton Netherlin, p. 20; Tr. 172, 240), and Mr. Childs felt at that time that Frank was capable of managing the ranch and the Childs' other property. Mr. Childs knew that he had signed an offer and a deed conveying the land to the United States in trust for the Papago Tribe (Tr. 140, 143; see also Tr. 236, 327). A lawyer whom Childs consulted in July 1950 testified that at that time Childs stated he had conveyed the property but thought he could "get the deed back" (Tr. 138-142). In 1951, Childs executed a will, the last clause of which provided (Def. Ex. V, Tr. 211):

I direct that the six (6) lots which I own in Gibson, Arizona (Homer Brown Addition) be sold upon my death and proceeds therefrom together with all of my property of every kind and character whether real, personal or mixed, and wheresoever the same may be situated, I hereby give, bequeath and devise an undivided One Twelfth (1/12) interest to each of my following-named twelve children: * * * (Emphasis supplied.)

The court found (R. 413):

Under the circumstances as disclosed by the evidence the offer to sell and warranty deed must be found to be ambiguous. Apart from the language appearing in said documents there is no evidence that Martha and Thomas Childs intended to convey irrevocably the land to the United States in trust and reserve only a beneficial interest for their own children. What Thomas Childs wanted to do was protect his children from their own folly. He hoped to keep his ranch intact and operating; to avoid breaking it up and yet insure that

his heirs and descendants would enjoy the full benefits of the property. The evidence sustains a finding that Thomas Childs, Jr. sought to establish a trust (without accurate knowledge of what a trust was) but did not intend by the arrangement made to divest himself of or to part irrevocably with the ranches, and further that he never believed that he had.

Although the documents -- the offer to sell and warranty deed -- appear to constitute a conveyance to the United States in trust for the Papago Tribe, reserving only a life estate, the evidence indicates that Martha and Thomas Childs, Jr. intended to create no more than a revocable trust for the benefit of their children and grandchildren.

The court concluded (R. 415-416):

III.

There was no meeting of the minds between Thomas Childs, Jr. and Martha Lopez Childs and plaintiff in the execution of the offer to sell lands dated February 10, 1947, and the acceptance by William H. Zeh, Area Director for Arizona for the Bureau of Indian Affairs of plaintiff, and the acceptance by the Papago Tribal Council by Resolution 314.

IV.

The execution of the warranty deed by Thomas Childs, Jr. and Martha Lopez Childs, purporting to convey the subject property to the United States of America in trust for the Papago Tribe, created no more than a revocable trust.

V..

Any trust that may have been established by the offer to sell and execution of the warranty deed by the Childs was revoked by the execution of the last will and testament of Thomas Childs, Jr. (Defendants' Exhibit V) executed January 20, 1951.

VI.

If the warranty deed would be otherwise valid so as to convey title to the United States as trustee for the Papago Tribe, it is invalid for lack of consideration.

VII.

If the warranty deed would be otherwise valid so as to convey title it is invalid because of the failure of the Papago Tribe to timely perform condition 4 of paragraph 9 of the offer to sell lands.

VIII.

The plaintiff, United States of America, has no right, title, or interest as trustee for the Papago Tribe, or otherwise, in [the property].

Accordingly, the court dismissed the action (R. 418). This appeal followed.

SPECIFICATION OF ERRORS

The district court erred in concluding that:

1. The United States was required to provide independent legal advice to Martha and Thomas Childs.
2. If the deed was otherwise valid as to convey title, it was invalid because of lack of consideration.
3. The deed to the United States as trustee for the Papago Tribe failed for want of consideration.
4. If the warranty deed would be otherwise valid so as to convey title, it is invalid because of the failure of the Papago Tribe to timely perform condition 4 of paragraph 9 of the offer to sell lands.

5. The acts of the Papago Tribe and the United States did not, as a matter of law, constitute fulfillment of condition 4 of paragraph 9 of the offer to sell lands.

6. A quasi-fiduciary relationship existed between Thomas Childs, Jr., and the government representatives with whom he dealt at the time of the execution of the offer to sell and the deed.

7. The United States had a fiduciary relationship with a non-Indian, Thomas Childs, Jr.

8. There was no meeting of the minds between the United States and Martha and Thomas Childs in the execution of the offer to sell and its acceptance.

9. The offer to sell and the warranty deed are ambiguous as to their meaning and intent.

10. It was necessary to examine the intent of the parties, even though the offer to sell and the warranty deed are clear and unambiguous on the faces of these documents.

11. The execution of the warranty deed by Mr. and Mrs. Childs created no more than a revocable trust.

12. Any trust that may have been established by the offer to sell and the warranty deed was revoked by the execution of the last will and testament of Thomas Childs, Jr., on January 20, 1951.

13. The United States of America has no right, title or interest as trustee for the Papago Tribe, or otherwise, in the lands in controversy in this proceeding.

14. The United States is not entitled to title to the lands in controversy in trust for the Papago Tribe.

15. The court also erred in failing to consider that any fiduciary duty owed by the United States to Indians on one side of this controversy, Mrs. Childs and her children, is also owed to Indians on the other side of this controversy, the Papago Tribe.

ARGUMENT

I

THE DEED CONVEYING TITLE TO THE UNITED STATES IN FEE AS TRUSTEE FOR THE PAPAGO TRIBE IS VALID

No one questions the authority of the United States to accept title in trust for the Indians. The two grounds relied on by the district court for invalidating the deed have no support in the deed itself or in the circumstances surrounding its execution.

A. There was consideration for the deed to the United States in trust for the Papago Tribe. - It is a well-established principle of law that "when the owner of property transfers it in trust, it is, of course, a valid trust although he received

no consideration for creating it." 1 Scott, Trusts (1939 ed.) sec. 29, p. 178; Diamond v. Berman, 60 N.Y.S.2d 339 (S.Ct. 1945); 2 Restatement, Trusts (1957), secs. 28, 29. This is because acceptance of the burdens of the trust is sufficient consideration. It is not denied that these burdens have been accepted by the United States. Hutchison v. Ross, 262 N.Y. 381, 397 (C.A. N.Y. 1943). In the present case, even if we regard certain conditions specified in the contract as consideration, these conditions have been met and the requirement satisfied. Indeed, with the exception of condition 4, the court does not question that the conditions have been met. Thus, the Childs were given a life estate, the children are still in possession of the property and using the improvements, and their preference rights are protected (Statement, supra, pp.1, 6).

The only other possible basis for the court's conclusion that there was a failure of consideration would be its determination that condition 4 of the offer to sell was not timely fulfilled. Condition 4 stated (Statement, supra, p. 6):

The acceptance of this offer is contingent upon the enrollment of the grantors' children as members of the Papago Tribe.

This condition was fulfilled on December 5, 1958 (R. 416), five years prior to the institution of this suit. It is now too late, having accepted the benefit of the fulfilled condition, to vitiate the transaction on the grounds that it was not timely done. In addition, the testimony is

undisputed that the Childs' children were entitled to receive all the benefits of members of the Papago Tribe, prior to formal enrollment, and there is no testimony that they were denied these rights. They had been included in the tribal census since 1940 (R. 409, 414). Three of the children had "attended the Indian school in Phoenix, Arizona" (R. 408). They had also requested employment assistance from the Bureau of Indian Affairs (Tr. 303, 306). It is not disputed that they had always been considered Papagos.

Formal enrollment with the Papagos is rare (Tr. 333). If a Papago was born off the reservation, formal adoption was not necessary and that individual was permitted to vote in tribal elections and obtain all the rights of a Papago (Tr. 333-334). This was also true of half-bloods who, "if they were residents, the district and the community recognized them as Papago, they were Papago" (Tr. 334; see also Tr. 319-320).

Childs was also concerned that his grandchildren have the benefit of Papago tribal membership after the death of his children (Tr. 37, 60). None of Childs' children died between 1947 and the formal enrollment in 1958. Thus, the delay in the formal enrollment could not possibly have affected any rights either in the children or the grandchildren.

B. Such reliance as the district court placed on a supposed quasi-fiduciary relationship between the Childs and the Government is not justified. - Perhaps because Indians are involved generally in this litigation, the court lost sight of the fact that Mr. Childs is not an Indian.^{2/} Consequently, no such relationship existed as to him. However, Mrs. Childs, who also signed the contract and deed,^{3/} is an Indian and the intended beneficiaries, the children are Indians. On the other side of the controversy is the Papago Tribe. Consequently, any special relationship of the United States which exists appears on both sides of the controversy and cannot be relied on to defeat the transaction in favor of one of the parties.

The court concluded that the Government should have insisted that the Childs obtain independent legal counsel (R. 413; Tr. 464). Certainly, without any knowledge that Mr. Childs did not understand the transaction (and we show later that he did), the Government was not bound either legally or morally to tell Mr. Childs, a non-Indian, to consult a lawyer prior to signing these documents. Childs was a successful

^{2/} And the land involved was not "Indian" land, i.e., held in trust or supervised by the United States.

^{3/} Mrs. Childs held her interest in the property because of Arizona laws of community property. Her participation in the negotiations concerning the property was nominal.

rancher and businessman, although not a lawyer (Statement, supra, p. 3). If he felt it was necessary to consult a lawyer, he would have done so, as he had on previous occasions when he found he could not create a trust in perpetuity, and subsequently to write a will (R. 427; Netherlin Dep., p. 12). To place any reliance on the absence of counsel would be to suggest that every time government officials deal with any individual, where there is a friendly relationship with that individual, any transaction is subject to attack if the Government does not tell him to consult a lawyer.

Reliance on the so-called quasi-fiduciary relationship also led the court to find (Tr. 464):

* * * the Government exercised undue influence sufficient to cancel the trust. The Court is not suggesting that there was any fraud or intentional misrepresentation on the part of the Government; what the Court finds is that under all the circumstances in this case, the Government owed a greater fiduciary duty to Martha and Tom Childs than that which was rendered.

We know of no authority to support a finding of undue influence under these circumstances. The entire transaction was initiated by Mr. Childs, not the Government.

C. The court's conclusion that there was no meeting of the minds with respect to the contract to sell is erroneous. -
Viewing the contract as a contract, rather than part of a trust

agreement (as the court apparently did), its holding that there was no "meeting of the minds" (R. 415) completely ignored a well-established principle of contract law. When the contract is unambiguous on its face, as even the court concedes,^{4/} it is not permissible to go outside the instrument to achieve a different result. St. Paul Mercury Insurance Company v. Price, 359 F.2d 74 (C.A. 5, 1966); Travelers Insurance Co. v. Castro, 341 F.2d 882 (C.A. 1, 1965). See also Jordan v. Hall-Miller Drilling Co., 203 F.2d 443 (C.A. 10, 1953); Mutual Benefit K. & A. Assn. v. Ferrell, 42 Ariz. 477 (1933). The district court has ignored the plain words of the contract and considered the supposed unexpressed subjective intent of one of the parties, Mr. Childs. The subjective theory of contract law has long been rejected by the courts. The objective theory followed by all courts was well stated over 50 years ago by Judge Learned Hand in Hotchkiss v. National City Bank of New York, 200 Fed. 287, 293 (C.A. 2, 1911):

* * * A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to

^{4/} Although the court concludes (R. 413) that the offer to sell and the deed are ambiguous, this language is based on the intent of Childs, since the court specifically refers to Childs' intent in finding that these documents are ambiguous (R. 413). The court then states (R. 413) that "the offer to sell and the warranty deed appear to constitute a conveyance to the United States in trust for the Papago Tribe, reserving only a life estate * * *."

certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.

Clearly, in the present case, there is no evidence that the Government had any reason to know that Mr. Childs did not understand that he was signing an offer and a deed which were unambiguous on their faces. The court specifically found that there was no fraud (Tr. 464) or misrepresentation (Tr. 464) and that the government representatives acted in good faith (R. 4). Childs told these representatives what he desired and documents were prepared incorporating his request (Tr. 37, 60, 383-386). He was a highly intelligent man.

Under these circumstances, the Government had every reason to believe that Childs intended to convey exactly what the documents described. Thus, the mistake, if any, was unilateral and not mutual. It is well-established that unilateral mistake is not grounds for rescission or reformation. Heath v. A. B. Dick Company, 253 F.2d 30, 35 (C.A. 7, 1958).

II

THE CONTRACT AND DEED TO THE
UNITED STATES UNAMBIGUOUSLY
CREATED AN IRREVOCABLE TRUST
FOR THE BENEFIT OF THE PAPAGO
TRIBE AND THE APPELLEES

As is apparent from the face of the deed, no power of revocation was provided. The law is well-established that a trust may not be revoked unless the power to revoke is specifically reserved in the trust instrument. As the Court of Appeals for the District of Columbia Circuit held in Teachers Ann. & A. Ass'n v. Riggs Nat. Bank of Wash., D. C., 278 F.2d 452, 457 (1960):

It is generally held, and in some jurisdictions is provided by statute, that neither a private nor a charitable trust may be modified or revoked unless the power to do so is reserved at the time the trust is created, regardless of whether the trust instrument contains language indicating irrevocability. 3 Scott, Trusts § 311 (1956); 4 Scott, Trusts § 367 (1956). In other words, there is a legal presumption that a trust is irrevocable, unless there is express provision to the contrary.

* * * * *

Even when the presumption is the only basis for irrevocability, it will prevail unless there is language in the trust instrument which can be said to reserve the power of revocation. And where the presumption of irrevocability is strengthened by express words of perpetuity or other indicia that the trust was intended to be perpetual, it will be held to be irrevocable, unless there is also a clear and definite statement to the contrary. In the event there are such plainly inconsistent provisions, the court must resolve the difficulty by determining from the four corners of the trust instrument what the actual intention of the settlor was.

The foregoing is a statement of the prevailing law, and the law of Arizona is not different. See Schuster v. Schuster, 75 Ariz 70, 251 P.2d 631 (1952).

In the instant case, like the District of Columbia case, not only is there no specific provision for revocation, but use of the fee simple deed in perpetuity as a trust instrument is totally inconsistent with any intention to reserve a power to revoke.

III

IN ANY EVENT, NO ATTEMPT
TO REVOKE WAS EVER MADE

Mr. Childs never made any attempt to revoke the trust. The court concluded that Mr. Childs' will revoked the trust (Statement, supra, p. 8). Clearly, it did not specifically do so. The only clause which could conceivably be so construed was the last clause, which provided (Def. Ex. V, Tr. 211):

I direct that the six (6) lots which I own in Gibson, Arizona (Homer Brown Addition) be sold upon my death and proceeds therefrom together with all of my property of every kind and character whether real, personal or mixed, and wheresoever the same may be situated, I hereby give, bequeath and devise an undivided One Twelfth (1/12) interest to each of my following-named twelve children: * * * (Emphasis supplied.)

The last half of this clause is the standard clause disposing of the residue of an individual's property. The law is quite clear that, even assuming that the settlor of the trust has reserved the power to revoke a trust, the power is not exercised by a general residuary clause disposing of all the residue of the property of the settlor. Chase National Bank v. Tomagno, 172 Misc. 63, 14 N.Y.S.2d 759 (S.Ct. 1939); Old Colony Trust Co. v. Gardner, 264 Mass. 68, 161 N.E. 801 (1928); 2 Restatement, Trusts (1957), sec. 330, com. J. In the present case, there is not even an oral expression of intent to revoke, since the attorney who drew the will did not remember whether Childs used the word "ranch" or "property" when he spoke of dividing his property among his children (R. 427; Netherlin Dep., p. 26). It indeed seems strange that no mention would be made of leaving his ranch in the will, since it is undisputed that he considered it his most important property.^{5/}

^{5/} The disposition of the property by the Probate Court of Pima County, Arizona, to Childs' children (Decree No. 1475) does not have any validity, since the court did not consider the deed in the name of the United States and the United States was not a party to that action (R. 410).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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MAY 1968

CERTIFICATE OF EXAMINATION OF RULES

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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1	Tr. 31	Tr. 31
2	Tr. 31	Tr. 31
3	Tr. 31	Tr. 31
4	Tr. 31	Tr. 31
5	Tr. 31	Tr. 31
6	Tr. 31	Tr. 31
7	Tr. 31	Tr. 31
8	Tr. 31	Tr. 31
9	Tr. 31	Tr. 31
10	Tr. 77	Tr. 79
11	Tr. 147	Tr. 150
12	Tr. 149	Tr. 325
13	Tr. 275	
14	Tr. 298	Tr. 303
15	Tr. 298	Tr. 303
16	Tr. 300	
17	Tr. 300	
18	Tr. 300	
19	Tr. 300	
20	Tr. 300	
21	Tr. 300	
22	Tr. 300	
23	Tr. 300	
24	Tr. 321	Tr. 321

<u>DEFENDANTS'</u> <u>EXHIBITS</u>	<u>FOR</u> <u>IDENTIFICATION</u>	<u>IN</u> <u>EVIDENCE</u>
A	Tr. 31	Tr. 31
B	Tr. 31	Tr. 31
C	Tr. 31	Tr. 31
D	Tr. 100	Tr. 104
E	Tr. 101	Tr. 104
F	Tr. 102	Tr. 104
G	Tr. 102	Tr. 104
H	Tr. 103	Tr. 104
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V	Tr. 210	Tr. 211
W	Tr. 244	
X	Tr. 282	
Y	Tr. 282	Tr. 283
Z	Tr. 283	Tr. 283
AA	Tr. 283	(withdrawn)
BB	Tr. 289	Tr. 336

JUL 24 1968

No. 22601

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

COLONEL FRANK CHILDS AND
ELIZABETH CHILDS, HUSBAND AND WIFE, ET AL.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

APPELLEES' BRIEF

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22601

UNITED STATES OF AMERICA,

Appellant

v.

COLONEL FRANK CHILDS AND
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Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
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APPELLEES' BRIEF

JURISDICTIONAL STATEMENT

The jurisdiction of the court below was invoked by the United States pursuant to 28 U.S.C. 1345 (R. 258). Jurisdiction of this court is claimed to be invoked by the Government pursuant to 28 U.S.C. 1291.

STATEMENT OF THE CASE

The United States of America, as Appellant adopts in its brief its own version of the facts, some of which were disputed; some of which are stipulated to (R. 399-404), and some

of which are inferences which cannot be substantiated by the evidence. The Government largely ignores the Findings which the lower court has made in resolving the disputed facts, and, in effect, from partial quotations from the Reporter's Transcript, attempts to present its case on the facts from portions of the dead record as if the trial and the trial court's Findings had never occurred.

The trial court entered Findings of Fact and Conclusions of Law (R. 405-417), and in addition, has stated by a transcribed Oral Decision dated March 17, 1967, while the trial was still fresh in the court's mind, the compelling reasons which the court felt would control its decision and pursuant to which Findings of Fact and Conclusions of Law were ordered filed by the respective parties. Indeed, the Findings of Fact and Conclusions of Law entered by the court (R. 405-417) were supplemented by the court's Oral Decision of March 17, 1967 "which served to support the Findings as made herein." (F.F. XVI, R. 415).

The Government's Statement of Facts in its opening paragraph concludes that Thomas Childs and his wife conveyed, in 1947, to the United States in trust for the Papago Tribe, 640 acres, reserving life estates in the grantors. The testimony and evidence will show conclusively that the Childses, as grantors, had no intention of entering into a transaction as

the Government contends. The transcribed Oral Decision of March 17, 1967 and the Findings of Fact (R. 405-417) relate in concise and chronological form the facts which the court found to exist from the evidence and its conclusions based thereon.

As will be developed further by the Appellees, it is their position that the Government's contention and position is not in accordance with the law and is unconscionable in that it attempts to take away from the Appellees, being children and grandchildren of Tom and Martha Childs, all of the property rights which had been in the family since the 1800's (R. 406). It is conceded by both parties that Tom Childs, because of his advancing years, sought an arrangement whereby the ranch properties could be secured against mismanagement and indeed, Childs consulted a lawyer about making arrangements to insure that his children and descendants would get these benefits. He was informed that it violated the rule against perpetuities (R. 411). Thereafter, and apparently unwilling to accept his attorney's advice, Mr. Childs sought the assistance of the authorities with the Bureau of Indian Affairs.

The Government agents, in the first instance, were laymen who represented to Mr. Childs that they would take care of this matter for him and would cause the necessary instruments to be prepared. Instruments were prepared, and the main issue in the lawsuit is whether or not these instruments manifest the

intentions of Tom and Martha Childs, husband and wife. The trial court had before it the evidence and inferences therefrom to consider, and based upon the record in this case the court resolved all these differences and entered judgment in favor of the Appellees.

The case went to trial on the Amended Complaint of the Government (R. 258), excepting that the accounting alleged in Count II thereof was dismissed. The Answer of these Appellees to said Amended Complaint, less the accounting, serve as the pleadings upon which the case was tried (R. 245-6; 271-2).

In addition to the 640 acres of patented land described in the Complaint there are $14\frac{1}{2}$ townships of Taylor Grazing Act Leases, or over 500 sections, that were allotted to Thomas Childs in January of 1939, according to the testimony of Dearl Wallace, Area Manager of the Bureau of Land Management (Tr. 193).

The Papago Tribe, in 1952 and 1953, applied to have this allotment transferred to the Tribe (R. 410), but their application was turned down (Tr. 206) and the application has not been prosecuted. These are the grazing permits referred to in paragraph 9 (1) of the Offer (Ex. C), which provision states:

"1. The offerers will cooperate with the grantee to the end that the grazing permits at present appurtenant to the lands described herein may be acquired by the grantee."

The additional contentions of the Appellees in this brief are that Thomas and Martha Childs would not want to also divest

their children and descendants of any rights in these Taylor Grazing Leases.

After the death of both Tom and Martha Childs, the United States Government continued to pay to Colonel Childs, Executor and son of Thomas Childs, or the lessees, the sum of \$1,750.00 annually from 1951 and since (Tr. 196) for a portion of the allotment withdrawn from grazing and used for a government bombing range (Tr. 195). It is interesting to note that the Government filed its Complaint in January of 1964.

A further bit of evidence is contained in the first part of paragraph Third of the Last Will and Testament of Thomas Childs, dated in January of 1951 (Ex. V), wherein the Testator states as follows:

"Third: I hereby direct that the War Department Lease money being paid to me quarterly at the rate of One Thousand, Seven Hundred and Fifty Dollars (\$1,750.00) per annum and which will be due my estate in the event of my demise until the year 1968 be given to my son Colonel Childs (Colonel Frank Childs) to be used for the care and maintenance of the ranches." (Emphasis supplied)

The evidence shows that the improvements, constituting buildings, etc., are also on parcels other than the 640 acres of fee land described in the Complaint. Thus, in his 1951 Will Thomas Childs was devising and bequeathing his interests not only in the patented land, being the 640 acres described in the deed, but the rent from the War Department and other assets distributed in the Decree of Distribution (Ex. X). Suffice

it to say, the Taylor Grazing Act Leases may be in jeopardy by the acts of the Government agents in causing to be prepared the Offer (Ex. C).

Under date of December 5, 1958 the Papago Tribe passed a resolution which enrolled the children of the grantors as members of the Papago Tribe. The evidence shows that this is eleven years after the Offer was executed and when both Thomas and Martha Childs were deceased (F.F. XV, R. 414-415), and that such enrollment was not made within a reasonable time after the execution of the Offer dated February 10, 1947. The Offer provides that it shall remain open for nine months (see paragraph 6, Ex. C).

The Appellant, in its brief, has attempted to seize upon the written documents as being the thrust of their argument, tending to ignore or minimize the other facts in this case. Appellees' contentions throughout this brief are predicated upon the actions of the Government agents; the admissions of the Government agents, and even the overreaching by the Government agents as set forth herein as it pertains to the intentions of the offerers-grantors, Thomas Childs and his wife, Martha Childs.

RESPONSE TO SPECIFICATION OF ERRORS IN GENERAL

The Government, in its 15 Specifications of Error, is contending, in general, that the court was not making the proper findings in accordance with the evidence.

The case at hand, of course, is not limited to the documents only and the findings of the court are explainable by weighing all of the matters presented to it.

Appellees believe that this court's decision relating to findings of fact under Rule 52 have been correctly applied by the trial court.

SUMMARY OF ARGUMENT

Unless the trial court's finding are clearly erroneous they cannot be set aside.

The Government, on page 2 of its brief, tries to confine the matters involved in this suit to the "QUESTIONS PRESENTED". A reading of the testimony and an examination of the exhibits will conclusively indicate that the court not only considered the documents but the testimony of all of the witnesses presented by deposition or by interrogatories and answers thereto. The trial court observed the demeanor of the witnesses, weighed their testimony and reconciled the evidence with what was required to substantiate its judgment. Had the court examined only the Offer, the deed and the other exhibits, as the Appellant attempts to limit the court to in its "Questions Presented", then this might have been another lawsuit.

The Government, in attempting to confine the review of this case to the "Questions Presented", is wholly ignoring the

conflicting inferences and has not pointed out where any of the Findings are "clearly erroneous." This court, in LUNDGREN v. FREEMAN, 307 F.2d 104 (CA 9 1962) has construed Rule 52 (a) F.R.Civ.P., which provides that: "Findings of fact shall not be set aside unless clearly erroneous ***." This court analyzed the position taken by Judge Frank in ORVIS v. HIGGINS, 180 F.2d 537 (CA 2 1950) holding that:

" '(i)f (the trial judge) decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding.' (id. at 539) Thus, under this view, direct observation of witnesses is the controlling criterion as to whether the trial court findings should be given weight."

Lundgren goes on further to say "Other courts, however, hold that the 'clearly erroneous' test does mean something, even where the trial was on written instruments and depositions." It appears that the Ninth Circuit has committed itself to the Clark view and the law construing Rule 52 in COMMISSIONER OF INTERNAL REVENUE v. DUBERSTEIN, 1960, 363 U.S. 278, 289-291, 80 S.Ct. 1190, 4 L.Ed.2d 1218. In Duberstein the Supreme Court stated:

"A finding of fact, to which the clearly erroneous rule applies, is a finding based on the 'fact-finding tribunal's experience with the mainsprings of human conduct'. A conclusion of law would be a conclusion based on application of a legal standard. Many Ninth Circuit cases espousing the Frank view are explainable as applying the rule that courts of appeal need give no weight to a trial court's conclusions of law."

It is submitted that the trial court has correctly applied the guide lines set down by this court, as can be seen from the evidence in this case. It is submitted that the trial court's findings are based on the court's experience with the "mainsprings of human conduct."

This court again, in WINEBERG v. PARK, 321 F.2d 214 (CA 9 1963), has stated that findings of fact made by the trial court may not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. See also L. A. SHIP-BUILDING & DRYDOCK CORP. v. UNITED STATES, 289 F.2d 222 (CA 9 1961). The court, in this later case, indicated "It is not our function to re-try questions of fact determined by the trial court, even upon uncontradicted evidence where differing inferences may reasonably be drawn from it." See also 2-B Barron and Holtzoff Federal Practice and Procedure, Secs. 1131-1133.

The testimony and evidence surrounding Martha and Tom Childs' concern for their twelve children and the ranch properties is clearly and conclusively established by the testimony of Denzil Tyler, a portion of which testimony is as follows

"A Mr. Childs told me that he owned a ranch in the vicinity of Ajo, that he was married to a Papago Indian woman, that they had a number of children, that it was his desire to establish an arrangement whereby after his death the property

of his ranch and whatever other assets he had would be held in trust or some such arrangement for the benefit of his descendants. He further stated that he felt his children were not capable of handling the ranch, that it would have to be handled by somebody else, but he wanted them to have the benefit of it for as long as -- this is something which I have been able to remember since my deposition was taken -- for as long as the children had Indian blood in them in excess of one-twelfth. That after they had acquired enough non-Indian blood not to have as much as one-twelfth, that he felt they could handle their own affairs, but until then the ranch was to be their means of support but under the control of someone other than the children." (Tr. 140-141)

A portion of the testimony of C. H. Hocker also shows the feeling that Mr. Childs had for his family, from the following testimony:

"Q You told us you thought Mr. Childs was the most wonderful man you ever knew. Do you know anything about his feeling for his family?

"A He loved his family very much. He gave all his attention to his family." (Tr. 169)

Mr. Hocker, under cross-examination by the Government's attorney, stated as follows:

"Q What did he tell you a year or two before that?

"A Well, that he was going to, that he was going to protect his children because his children, he was afraid -- he told me, maybe two years, three, I can't state a day on that.

"Q Yes, sir.

"A He told me he was going to do it.

"Q Going to do what?

"A Going to get, turn it to the Tribe to take the ranch and be kind of guardian on the ranch, but he expected it always to belong to his children." (Tr. 175-176)

The testimony of Jack Weidner, who had an association of long-standing with Tom Childs, stated as follows:

"Q Mr. Weidner, did you get to know him well enough to know what his feeling was toward the ranch?

"A Yes, sir.

"Q What was it, sir?

"A He loved that ranch very much and he wanted it -- in other words he felt it security for himself and his family and he felt it was a cover-up for anything.

"Q Now, how about his children, did you know him well enough to know how he felt about his children?

"A He loved his children an awful lot."
(Tr. 184-185)

The only inference that the court could draw from this testimony is that Mr. Childs had a great love for his ranch and had a great love for his family and children. It is submitted that the other inference which can be drawn therefrom is that he did not intend to make an improvident disposition of his ranch properties, but on the contrary, intended that the fruits of his efforts and that of his father, from whom he acquired the homestead rights (R. 400), would descend and be transferred to his children and their descendants. It is also to be inferred that there is no probative evidence from an impartial

witness that the Childses ever intended to dispose of their property so that upon their death their children had no fee interest for themselves or their descendants.

The trial judge was presented evidence which was not entirely harmonious or consistent with the transaction described by the Government agents. After Tom Childs' counsel advised him that the arrangement he sought violated the rule against perpetuities he discussed his intentions with Joe A. Wagner (Tr. 394) and Arthur A. Lusher (Tr. 57-59). As a result of this conference the Offer to Sell Land to the United States (Ex. C) was prepared, which was ultimately executed by Thomas Childs and by Martha Lopez Childs, the latter by placing her thumbprint thereon, and by Joe A. Wagner and Arthur A. Lusher. There is nothing in the record from the mouths of the Government witnesses, including the Government attorney, Mr. Sanford, which shows what explanation was given to the offerers as to exactly what was being signed by them. It is interesting to note that in Exhibit C, being the Offer, there appears the following opening sentence:

"WHEREAS, the United States of America is acquiring land for Indian purposes under the provisions of the Act of June 18, 1934 (48 Stat. 984) as a donation." (Emphasis supplied)

This evidence that the land is being acquired as a donation was considered by the judge because the trial court found that only the sum of One Dollar was paid and that no other valuable

consideration passed to the grantors (F.F. XV, R. 414). The trial court was also confronted with a provision in said Offer, being paragraphs 9 (5) and (6) which read as follows:

"5. As part of the consideration of this conveyance it is understood and agreed that the children of the grantors shall be granted a preferential right of assignment of the use of the buildings and existing improvements located on the lands described herein."

"6. Descendants of prior deceased children of the grantors shall be enrolled as members of the Papago Tribe provided that they are one half or more degree of Papago blood."

The record is absent any testimony as to what was explained by the Government attorney or agent what said provisions meant. The trial court was not furnished any evidence by Government witnesses explaining what was mean by the term "preferential right of assignment of the use of the buildings and existing improvements ***." The words "preferential right" are words of art (see 3d Dec. Dig. 425, Indians 13(4)) but are ambiguous and uncertain with reference to the rights of Childs' children allegedly granted in Exhibit C.

The evidence further shows (Tr. 60) that paragraph 9 (6) (supra) was a mistake and had no meaning because there were no prior deceased children of the grantors. The following testimony of Mr. Lusher conclusively establishes this information and knowledge was thereby made known to Appellant:

By Mr. Barber.

"Q Mr. Lusher, did he tell you that all of their children who had any issue were living? In other words, children who had children were still alive.

"A The best I can recall, I do not believe that such a matter was brought up." (Tr. 59)

* * * * *

"Q (Mr. Mr. Barber) I will reframe the question.

"You have already told me the purpose of these conditions was to try to convey in writing legally what Mr. Childs wanted. What do you understand condition No. 6 to mean, sir?

"A Just what it says, that any descendants of prior deceased children shall be enrolled as members of the Papago Tribe. I am quite vague on that myself as to discussion and such.

"Q Does it indicate to you that Mr. Childs at that time had a deceased child who had living children?

"A It does.

"Q And if that is shown to be untrue, then that is a mistake, is it, sir? (Emphasis supplied)

"A It so appears." (Emphasis supplied)
(Tr. 60)

Thereafter, on May 6, 1947, Thomas and Martha Childs executed a warranty deed (Ex. A) to the United States of America in trust for the Papago Tribe to the 640 acres in question, subject to reservation of a life estate in the grantors. Again Martha Childs executed this instrument by affixing her thumbprint thereto. Nowhere on said conveyance is there any recital

nor are there any conditions to connect it to the Offer (Ex. C). Thus the Government wishes this court to determine that the warranty deed and the Offer are the primary things to be considered in this appeal. Even these documents do not purport to carry out the grantors' intentions, and it is interesting to note the testimony of Burton Ladd, Superintendent of the Papago Agency, as follows:

By Mr. Barber.

"Q Do you remember my asking you this question and you giving me this answer, Mr. Ladd:
'Question: Doesn't an outright deed in trust to the Papago Tribe defeat Mr. Childs' intent and purpose?' 'Answer: The Government couldn't have accepted a deed for the Tribe in any other form.'

"Didn't I ask you that question, and didn't you give me that answer, sir?

"A Yes." (Tr. 350)

Again, on cross examination, Mr. Ladd further testified as follows:

"Q Do you know now as you sit there whether or not he seemed to convey that impression to you, that all he had to do if he became dissatisfied, was write a letter and withdraw that so-called offer to sell and the deed that followed?

"A In our conversations, as I remember them, he indicated that he felt that the land part had been taken care of by the previous arrangement.

"Q I understand that, but didn't he indicate in these conversations that that could be changed at his discretion?

"A I couldn't say that it could or not.

"Q But you did get that impression?

"A My only personal feeling was that that would be possible, not based on any legal --

"Q Do you know --

"MISS DIAMOS: If the Court please, I don't think the witness has finished his answer.

"A My own feeling was that wasn't based on any legal background, just moral.

"Q I understand. You were superintendent at that time, were you not?

"A Yes." (Tr. 343-344)

The testimony of Mr. Ladd can be rationalized in two ways. One, that the Childses did not intend that the documents were delivered in law; that is to say, that they did not intend that they were bound thereby. The other view is that the Childses could withdraw these instruments if they so desired, which would negate the transaction evidenced by the Offer and deed.

This inference is consistent with Thomas Childs' conversation with his attorney, Denzil Tyler, in July of 1950, part of which conversation related by Mr. Tyler is as follows:

By Mr. Barber.

"Q Did he say anything to you about a deed, a trust deed being with the Council?

"A He told me that he had left a deed with someone in the Tribal Council. I don't think he used the word trust, but I gathered he had left it with them in a fiduciary capacity to hold for

him until details could be arranged whereby they would carry out his desires.

"Q Did he tell you what the deed allegedly was to do or pass title to?

"A Well, I don't remember now whether it was all or a part of his land.

"Q Did you have any concern about making a Will with an arrangement, trust arrangement if there was an outstanding deed; at that time did you have any concern?

"A Well, it was his desire that the Tribal Council handle this and the deed was with them, but he was sure that the deed was not effective until and unless details were arranged.

"Q Did you discuss that part with him?

"A He voluntarily told me that he was sure he could get the deed back any time he wanted it."
(Tr. 141-142)

The state of mind of Thomas Childs as evidenced by the testimony of Denzil Tyler and the witness for the Government, Burton Ladd, certainly confirms that this arrangement could be recalled or revoked by the withdrawal of the Offer and deed. This is analogous to the old portrayal in western movies that he who acquires the paper deed to the ranch acquires the ranch, even though stolen from the safe.

The Government contends that it did not stand in a fiduciary relationship with a non-Indian, Thomas Childs, Jr. The Government agent, Joe Wagner, who was one of the signers of the Offer (Ex. C), testified as follows:

"Q Mr. Wagner, I took down some of the remarks you made about your association with Mr. Childs, and I want to repeat some of them, and, if I am mistaken, you readily tell me so, will you?

"Now, in regard to meeting with him, in response to a question asked by Miss Diamos, you said, 'We met many times.' You said that, didn't you?

"A That's right.

"Q And you also said he called you Cy.

"A May I also state that most of the time I met with him was at his request, either by telephone or by letter?

"Q You were very good friends, weren't you?

"A Let's say trustful friends.
(Emphasis supplied)

"Q He had a lot of confidence in you, didn't he, sir?

"A Yes, sir." (Tr. 394)

On other occasions the Government agents had prepared a Will for Thomas Childs to sign. It can be readily seen that the Government, through its agents, stood in the position of a quasi fiduciary as concluded by the court (C.L. II, R. 415). It is established from the evidence that a confidential relationship existed between the grantors and the agents of the Government and of the Papago Tribe, who advised and worked with the Grantors, prepared the instruments in question, and purportedly advised them of the legal import thereof and furnished

explanations, although the details thereof are aliunde the record. The Grantors sought the advice of the Government agents because they were ignorant of the legal questions involved; were not on the same level or even similar in intelligence and training with the Government agents, and had absolute trust and confidence in them to assist the Grantors in establishing an arrangement which would carry out their intent. Martha Childs was unable to understand the transaction, and could not even sign her name except by thumbprint. The Offer was not explained to her in Papago by Mr. Sanford, but according to the Government's testimony, this was done by Tom Childs after it was explained to him by Mr. Sanford (Tr. 386). When it came time for the execution of the deed Martha Childs, in the presence of her husband and others, including Tom Segundo, the Chairman of the Papago Tribal Council, who was to serve as an interpreter, was concerned about executing any documents, and the testimony of Philip Childs, present during the signing, is as follows:

"Q (By Mr. Barber) Tell us what your mother said and what Segundo answered back to your mother.

"A Well, I was up there and my father says, 'Come on over here, Phil, and your mother is going to put her thumbprint here,' and Segundo said, 'If you put your thumbprint on there --' My mother said, 'I am afraid if I put my thumbprint on there that you will take the ranch away,' and Segundo said, 'We will take care of the boys,' and she did.

"Q I wish you would repeat that because I didn't get some of the words. First tell us what your mother said.

"A Well, my mother said, 'If I put my thumb-print on there, you won't take my ranch away from the boys?'

"Q 'You won't'?

"A Yes.

"Q What did Segundo say?

"A Segundo said, 'No, we will take care of your boys.'

"Q Now, at that time -- oh, by the way, what language were they conversing in?

"A They were talking in Papago.

"Q At that time and place, did your father say anything to you in English about some papers that were there?

"A Yes, he said, 'Phil, the deeds to the ranch will be taken care of by the Papago Tribe.' He asked, I think it was Claymore he asked that, 'What would you charge me to take care of this deed for the boys?' And he says, 'That will be up to the Papago Tribe.' Segundo -- and my father said, 'What would you charge the boys?' Segundo said, 'Nothing. It will be there any time you want this deed.' My father said, 'Did you get that, Phil?' "

(Tr. 266-267)

With the facts and the legal and proper inferences that the trial court drew therefrom the basic arguments of the Government appear to be predicated upon challenging, but without pointing out where the findings are clearly erroneous, those facts found by the trial court. It is submitted that the Government has not satisfied the requirements of Lundgren, Duberstein and Wineberg (supra).

RESPONSE TO SPECIFICATION OF ERRORS 2, 3,
4, 9, 11 and 12

The Government has covered four areas in its Specification of Errors. Specification of Errors 2, 3, 4, 9, 11 and 12 are herein designated as the "first area" and are predicated upon the deed, the Offer and the legal effect of this transaction.

Appellees will respond to all Specification of Errors designated by Appellant and will show the evidence relied upon by Appellees as supporting the challenged finding, even though the Government has not, in all cases, stated with particularity where the Findings of Fact and Conclusions of Law are alleged to be erroneous as required by Rule 18 (d) of this court.

SUMMARY OF ARGUMENT

The trial court has properly found on a preponderance of the evidence that the deed was ineffective because it lacked consideration; that it failed for want of consideration, and that condition 4 of paragraph 9 had not been performed; that said documents were ambiguous and created no more than a revocable trust. That any trust that may have been established was revoked by the execution of the Last Will and Testament of Thomas Childs on January 20, 1951.

The Appellees, on pages 43 to 50 of this brief, have pointed out that the failure of enrollment of the Childs' children constituted a failure of consideration upon non-performance. The court, in FARRELL v. THIRD NATIONAL BANK OF NASHVILLE,

101 S.W.2d 158 (C.A. Tenn. 1936), has stated:

"*** Failure of consideration is in fact simply a want of consideration, and if a partial failure of consideration is such as to effect the whole contract, then it may be grounds for rescission."

The court went on to say:

" 'Aside of enactments of this kind, the general rule appears to be that a partial failure of consideration will justify a rescission or cancellation of an obligation in equity if the contract is entire and the consideration therefore not apportionable.' "

The trial court has stated that the conveyance must fail for lack of consideration because it found that Martha and Tom Childs received nothing in return for parting with such valuable properties. Nor did the United States, as promissor, suffer any detriment. The United States did not give adequate consideration for the lands. The United States gave one dollar but no other "valuable consideration" as appears in the record (F.F. XIV, R. 414).

The trial court had to examine the deed and Offer (Ex. A and Ex. C) in the environment in which said documents were created. The court found that apart from the language appearing in said documents, there is no evidence that Martha and Thomas Childs intended to convey irrevocably the land to the United States in trust and reserve only a beneficial interest for their own children. Indeed, the court observes that the evidence sustains the finding that Mr. Childs sought to establish

a trust (without accurate knowledge of what a trust was) (F.F. XIII, R. 413).

The testimony of Mr. Tyler is illustrative of Mr. Childs state of mind, as is evidenced by the following testimony:

By Mr. Barber.

"Q Did he say anything to you about a deed, a trust deed being with the Council?

"A He told me that he had left a deed with someone in the Tribal Council. I don't think he used the word trust, but I gathered he had left it with them in a fiduciary capacity to hold for him until details could be arranged whereby they would carry out his desires." (Tr. 141)

In reading over all of the findings of the court, the court correctly went outside the documents to determine the intent of the parties. Arizona follows the general principle that the court may go outside the document to construe the trust and determine the intent of the parties.

If the language of a trust is ambiguous the Court may go outside the document to establish the intent. STATE v. COERVER, 100 Ariz. 135, 412 P.2d 259 (Supreme Court of Arizona in Banc) at page 262, 263, states:

"*** A general principle of law applied to either a private or charitable trust, is that when a trust is created by a written instrument, the intention of the settlor is ascertained from the express language of the instrument, and court will not go outside the instrument in an attempt to give effect to what it conceives to have been the actual intent or motive of the settlor. If, however, the intention is not plainly expressed,

or if the language used is ambiguous, there are well-established rules which courts will invoke to aid them in the construction of the instrument. See *Olivas v. Board of Nat. Missions of Presbyterian Church*, 1 Ariz. App. 543, 405 P.2d 481 (1965).

"One such rule is that the determination of the intention of the settlor, where construction is necessary, will be made in light of surrounding circumstances at the time of execution of the deed. The court places itself in the position of the settlor at the time of creation of the trust and interprets what he has said or done in light of his environment at that time. In the instant case the language used does not plainly express the intention of the grantor, and, therefore, it is necessary for us to look at circumstances surrounding the execution of the deed to determine if a trust was intended, and if so, the nature of any trust so created, its terms and its beneficiaries."

Parol evidence may be used to establish the true intent of the parties. CHANTLER v. WOOD, 6 Ariz. App. 134, 430 P.2d 713 (Court of Appeals of Arizona, July 25, 1967, Rehearing Denied Aug. 9, 1967, Review Denied October 3, 1967) at page 718, states:

"*** Appellants other contention that in the quiet title action plaintiffs may not divest them of title solely upon the basis of parol evidence is answered by the fact that the parol evidence rule does not apply to a situation where there was a prior agreement and by reason of mutual mistake of fact, instruments have been so framed as not to express the true agreement of the parties. Such evidence is admissible for the purpose of proving the content of the pre-existing express agreement of the parties to the instrument. *Berger v. Bhend*, 79 Ariz. 173, 285 P.2d 751 (1955); *McNeil v. Attaway*, 87 Ariz. 103, 348 P.2d 301 (1960); *Hollars v. Stephenson*, 121 Ind. App. 410, 99 N.E.2d 258 (1951)."

The subsequent conduct of the parties can be examined to determine their understanding and intent. GRAHAM v. VEGETABLE OIL PRODUCTS COMPANY, 2 CA-CIV 36, 401 P.2d 242 (Court of Appeals, April 28, 1965. Rehearing Denied June 9, 1965, Review Denied July 6, 1965) at page 247, states:

"We agree with the lower court. The language of Webb's purported promise was not unequivocal and requires resort to extrinsic evidence from which the intention of the parties can be determined. McClave v. Electric Supply, Inc., 93 Ariz. 135, 141, 379 P.2d 123 (1963). Such intention can be ascertained solely from an examination of the circumstances--the deeds must illuminate the words. The subsequent conduct of the appellants in looking to Y-F Ranches for payment indicates that they continued to regard Y-F Ranches as the debtor. ***"

Considering that part of the environment or circumstances that existed in this case are as follows: that the Childses wanted to protect the children from their own folly (Tr. 140-141); that the Childses intended to keep the ranch intact and avoid breaking it up so it would be secure for their children and descendants (Tr. 140-141); that Childs was advised that this arrangement violated the rules against perpetuities (Alton Netherlin Deposition, page 11, R. 427); that the Government agents intended to help him with his problem (Tr. 36); that the Government agents prepared documents that would defeat the intent of Mr. and Mrs. Childs, but could accept these documents as being the only statutory provision permitted (Tr. 350); that Thomas Childs had great love for his ranch and children

(Tr. 184-185); that Childs felt that because of the drinking problem that his children might not be able to manage the ranches with the necessary business acumen (Terry Deposition, page 13, R. 428); that the Childses left an impression with Mr. Ladd that the Offer and the deed and arrangement could be withdrawn by them (this according to the testimony of the Government's witness, Burton Ladd) (Tr. 343-344), the trial court found that the Offer and deed and the transaction were ambiguous and correctly applied the law in attempting to search out the true intent of Mr. and Mrs. Childs.

Perhaps the most ironic part of the whole case in the Government's effort to quiet title to the land described herein is in making come true the prediction of Martha Childs when she told the Papago interpreter "I am afraid if I put my thumbprint on there, that you will take the ranch away." and Segundo said, "We will take care of the boys." (Tr. 266).

The government takes the trial court to task again for its conclusion that the Offer and deed created no more than a revocable trust (C.L. V, R. 416) and also that the Offer and deed were revoked by the execution of the Last Will and Testament of Thomas Childs, executed January 20, 1951 (Ex. V) (C.L. V, R. 416). Appellees have covered, in pages 33 - 43 of this brief, the fiduciary or confidential relationship existing between the contracting parties. Since the court has found that the Offer

and deed are ambiguous, considering the surrounding circumstances (F.F. XIII, R. 413), and further, that the Childses did not intend to divest themselves of the fee to the ranches, this is analogous to the settlor of a trust omitting to insert, by mistake, a provision of revocation. This is succinctly stated in RESTATEMENT OF THE LAW OF TRUSTS (Second) (1959 Ed.), Sec. 330 b, page 133:

"** If, however, the settlor intended to reserve a power of revocation but by mistake omitted to insert in the trust instrument a provision reserving such a power he can have the instrument reformed (see § 332), or if he was induced to create the trust by fraud, duress, undue influence or mistake, he can have the trust set aside (see § 333).

"If the meaning of the trust instrument is uncertain or ambiguous as to whether the settlor intended to reserve a power of revocation, evidence of the circumstances under which the trust was created is admissible to determine its interpretation. See § 38.

"Where the creation of a trust is evidenced by a written instrument which shows on its fact that it is not a complete integration of the terms of the trust, extrinsic evidence is admissible to show that the settlor manifested an intention to reserve power to revoke the trust. Thus, if prior to the creation of the trust it was orally agreed that the owner of property would transfer it to another person as trustee and that the owner should have power at any time to revoke the trust, and the owner subsequently transfers the property by a written instrument which directs the trustee to hold the property according to the terms of the agreement orally made between them, the settlor has a power of revocation. Compare Restatement of Contracts, § § 226-244."

It has been the position of the Appellees that the Childses did not intend to execute a trust and the trial court has, in

substance, found every essential fact necessary to support this position. One of the fundamentals of contract law is that the documents must be delivered; that is, that they should be delivered in law as well as in fact. In BROWN V. FIRST NATIONAL BANK OF NOGALES, 36 P.2d 174, our court held that parol evidence was admissible to determine the intent of the parties as to whether or not delivery was effected. In ROBINSON v. HERRING, 75 Ariz. 166, 253 P.2d 347 (Ariz. 1953), the court stated, at page 349:

"*** We further said, to constitute a delivery, there must be not only a delivery but an acceptance and it must appear that the grantor's intention at the time was that the deed should pass title and that he should lose all control over the property conveyed by the terms thereof."

See also PARKER v. GENTRY, 62 Ariz. 115, 154 P.2d 517.

The Restatement of Trusts, supra, at page 135, has this to say about an incomplete trust ineffective because of want of delivery:

"e. Where creation of trust incomplete. The rule stated in this Section is applicable only where a trust has been created. If the settlor has not taken all the steps necessary for the creation of the trust (see § § 17-73 (Chapter 2)), no question of revocation arises. Thus, if the owner of property makes a conveyance inter vivos of the property to another person to be held by him in trust for a third person, and the conveyance is not effective to transfer the property because of want of delivery of the subject matter of the trust or of a deed of conveyance (see § 32), or because it is a testamentary disposition (see § § 53-58), no trust is created and the property remains in the

owner free of trust. In such cases it is immaterial that the settlor did not reserve a power of revocation, since no trust is created."

RESPONSE TO SPECIFICATION OF ERRORS 8 and 10

The second area covered in the Government's Specification of Errors 8 and 10 refers to the lack of a meeting of the minds between the United States and the Childses and the intent of the parties.

SUMMARY OF ARGUMENT

The court was correct in holding that it was necessary to examine all of the circumstances to ascertain the intent of the parties.

Again the Government takes the trial court to task, citing in support thereof a proposition of law which is quoted from the Hotchkiss case, which, in essence, holds that a contract has nothing to do with the personal or individual intent of the parties unless there is "some mutual mistake, or something else of the sort."

Appellees will show that a mutual mistake or something else of the sort exists in the case at bar, the "something else" being that the deed and Offer do not carry out the Childs' intentions but are "something else."

The Offer to Sell Land (Ex. C) is executed pursuant (so it says) to the Act of June 18, 1934, 48 Statute 984, which

has apparently been codified in 25 U.S.C.A. 463, 464 and 465.

The final paragraph of the Act states as follows:

"Title to any lands or rights acquired pursuant to Sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall be taken in the name of the United States in trust for the Indian Tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." (Emphasis supplied)

The above-quoted provision restricts the authority of the United States Government to accepting land in the name of the United States in trust for a specified tribe or individual Indian. It is legally impossible for the United States Government to accept land under the authority of this statute and hold it for a group of Indians. The court found that the evidence established that the desire of Mr. Childs was to keep his ranch intact and insure the benefits thereof for his children and descendants (F.F. XIII, R. 413). An arrangement such as Mr. Childs requested could not be made under the authority of the Act of June 18, 1934.

25 U.S.C.A. 469 provides as follows:

"§ 469. Indian corporations; appropriations
for organizing

"There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed \$250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations

or other organizations created under sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title. June 18, 1934, c. 576, § 9, 48 Stat."

These statutes, amongst others, are quoted to show the complexitites of Federal Indian law and the apparent inability of laymen to understand the same or to explain the law to other laymen for the purpose of seeing if said laws are applicable in formulating an estate plan such as Martha and Tom Childs should have -- not what the Government maintins they should have and knowingly created.

Of further importance in considering the authority to carry out the wishes of Thomas Childs it is necessary to look to the Constitution and By-Laws of the Papago Tribe (Ex. 3). Article VIII thereof regulates and controls the use of land acquired thereunder. There does not appear to be a single section in this Article, or in the Constitution, which gives the authority to the Council to acquire and hold land for the sole benefit and use of a specific group of Indians. It should further be noted that there was no evidence that the Papago Council ever passed an ordinance in an effort to allot the Childs' Ranch to the Childs' children in accordance with the Papago Constitution. Section 3(a) of Article VIII would require an ordinance passed by the Papago Council and approved by the District Council.

In view of the requirements of the above-quoted Act of June 18, 1934 and the restrictions set forth in the Constitution and By-Laws of the Papago Tribe, Arizona, there were no statutory provisions which the Government could use in furthering the true intent and desires of Thomas and Martha Childs.

Burton Ladd has conclusively demonstrated this contention and the substance of his testimony indicated that an outright deed in trust to the Papago Tribe would defeat Mr. Childs' intent and purpose, and that the Government couldn't have accepted a deed for the Tribe in any other form (Tr. 350). Burton Ladd doesn't want the Government to make a mistake, but the Government agents, as is conclusively shown by the evidence, have influenced the Childses into a transaction that it not their intent.

The Restatement of Trusts, Second (1957), Sec. 333, page 149, states:

"A trust can be rescinded or reformed upon the same grounds as those upon which a transfer of property not in trust can be rescinded or reformed.

"e. Mistake. The settlor can rescind a trust created by him as a result of a material mistake. Where no consideration is paid for the creation of the trust, it is sufficient that the settlor was induced by mistake to create the trust, although neither the trustee nor the beneficiary shared in the mistake or knew of it, since in the case of gratuitous transfers a mistake by the transferor is a sufficient ground for setting aside the transfer, although the mistake was not caused or shared by the transferee and he did not know or have reason

to know of the mistake of the transferor. On the other hand, where the owner of property receives consideration for making a transfer of the property in trust, the rules applicable to transfers for value and to contracts are applicable, and the fact that the owner made the transfer under a mistake is not of itself a sufficient ground for setting aside the transfer. See Restatement of Contracts, § 503. The settlor cannot rescind the trust if the beneficiary has so changed his position without notice of the grounds for rescission that it would be inequitable to permit the settlor to rescind. Compare § 292."

RESPONSE TO SPECIFICATION OF ERRORS
1, 6, 7 and 15

This third area that the Government covers in its Specification of Errors refers to its Specifications 1, 6, 7 and 15, which relate to the fiduciary relationship existing between the parties and the court's Finding that the Government failed to advise or insist that the Childses have the benefit of independent legal advice (not that it was required to provide legal advise as set forth in Specification of Error No. 1).

SUMMARY OF ARGUMENT

The United States, acting through its representatives, as the court correctly found, stood in a position of a quasi fiduciary relationship with Tom and Martha Childs.

The Government states that the trial court erred in concluding that the United States was required to provide independent legal advice to Martha and Tom Childs. The Government has not accurately stated a portion of the court's Finding,

which reads as follows:

"The United States failed to advise, or insist as (it) should have done, that Martha and Tom Childs have the benefit of independent legal advice regarding the documents before they allegedly transferred irrevocably the ranches to the United States in trust for the Papago tribe." (F.F. XII, R. 413)

As pointed out herein, these documents were prepared after Mr. Wagner and Mr. Lusher conferred with the Childses and as laymen it is obvious that they were not competent to give legal advice and assume to act as legal advisors. The fact that the Government lawyer, Mr. Sanford, prepared these documents in Phoenix, Arizona without first conferring with the Childses, supports the Appellees' position rather than refuting the same. A Government lawyer, or agents assuming the roll of lawyers, cannot serve two task masters any more than non-government attorneys can.

The Government also contends that it would be error to suggest that "every time Government officials deal with any individual where there is a friendly relationship with that individual, any transaction is subject to attack if the government does not tell him to consult a lawyer."

Appellees contend that in this instance the court has correctly found that the government owed a greater fiduciary duty to Martha and Tom Childs than that which was rendered (Oral Decision, p. 11) (F.F. XVI, R. 415).

The trial court considered that Martha Childs is a Papago and her children are half Papago. The Government assumes because Mr. Childs is Caucasian that this insulates him from any requirements of good faith and competence on the part of the Indian agents, Mr. Lusher and Mr. Wagner, whom, as laymen, assumed the role of Childs' legal advisors (Oral Decision, p. 8).

The testimony of said agents shows that after their discussion with Mr. Childs they went to Phoenix to see Mr. Sanford the attorney for the Bureau of Indian Affairs, and instructed him what they felt should be done. Mr. Sanford then put in legal terms the Offer (Ex. C) without first conferring with the Childses to determine what their legal requirements were. The Government, in its brief (p. 17) concludes that the documents were prepared incorporating his request. Remembering that Tom Childs was not formally educated nor schooled in the law, it cannot be assumed by any stretch of the imagination that his entire request was contained in the documents. It would be difficult for Mr. Lusher, Range Examiner, to discuss this with Mr. Burge and Mr. Wagner, all laymen, have it typed in Phoenix (Tr. 67) and submitted to the agency at Sells and sent back to Phoenix (Tr. 67) without ever having someone with legal training discuss the requirements of the Childses.

When the Government asserts that there is nothing in the

record to show the confidential or fiduciary relationship, they ignore the fact that the Government agents not only did prepare the Offer and deed for the Childses, but Mr. Lusher, his trusting friend in whom he reposed great confidence, related as follows:

By Miss Diamos.

"Q Now, did she -- strike that.

"Did you take part, after this, in meetings with Tom Childs about drawing up a Will?

"A Yes.

"Q And did he ever, to your knowledge, execute a Will that you or Mr. Ladd assisted to draw?

"A He never executed a Will that I know of, except this later date when -- the last year when you showed me his final Will and Testament, but otherwise, many Wills were prepared for him, but not one that I know of that was executed by him.

"MISS DIAMOS: Now, if the witness could be handed plaintiff's Exhibit 15.

"Q Do you recognize any writing on there?

"A Yes, it's my writing on pencil notes on the side of this instrument.

"Q Was that Will ever executed, to your knowledge?

"A No, this is stated, 'Sample received, Bureau of Indian Affairs, November 9, 1948,' and the explanation that we made in here, he had changed John Thomas Childs as executor and he wanted Philip's name inserted, so I put in, in pencil, and sent it to the Phoenix Area Office where Sanford or whoever would be the solicitor would rewrite, if there were any changes, and send it back to Tom Childs." (Tr. 389-390).

In Informal Decision No. 508, dated March 22, 1962, of the American Bar Association's Standing Committee on Professional Ethics, it was held improper for an attorney, when the information pertaining thereto was furnished by a broker or title company, to prepare deeds, contracts and mortgages. The Opinion states that such a transaction lacks the personal contact that should exist between the attorney and client. "Such relationship is necessary to a proper representation of any kind."

The Committee's Opinion goes on further to say "It seems almost impossible for a lawyer to properly prepare a deed, contract or mortgage in total ignorance of existing problems and with no opportunity to discuss the situation with his client. *** Most buyers or sellers would assume that the instruments had been prepared to the best of the lawyers professional ability. Thus misrepresentation might occur or serious misunderstanding result." (Emphasis supplied).

While the trial court found that Mr. Childs was an intelligent, self-educated individual, it also found that he was unschooled in the technicalities of the law and legal problems encountered in transferring land and planning estates, and relied on the Indian agents to effect his desires to benefit his children and grandchildren (F.F. X, R. 412). His inability to understand the technicalities of the transaction at bar is

evidenced by the testimony of Arthur Lusher, the Government Range Examiner, who stated (Tr. 36-37):

"Q (By Miss Diamos) What was said to the best of your recollection, Mr. Lusher?

"A To the best of my recollection, my first knowledge was a mention by Mr. Childs of what he wanted and then later, probably at another one he mentioned it again and then when I saw he was serious and such, I did tell him that I would help him in every way I could to do or attain what he wanted to attain, but first I had to get permission from the Superintendent at Sells, who was my immediate supervisor, and then depending on that I would go ahead and help him how ever I could.

"Q Sir, what was said, what was this first reference, second reference, and third reference, what was said to the best of your recollection?

"A That he was getting to be an old man and that he was worried about what would happen to his land when he was gone. That he wanted -- that he would like to have me help him make out a Will or whatever was necessary in order to turn his property over to the Papago Tribe and that in order to do this he wanted to attain one very important thing, and that was that his children would have full rights to those lands for as long as they lived and that somebody else -- that is what it amounted to, meaning the Papago Tribe and the Government or such, he did not understand such things. But in the meantime would pay the taxes and see that the lands would not be lost and that his children would always have then through their lives a place to live and do whatever they wished on and then when they were gone, he could see no farther than that. And I asked him what he wanted in regard to his grandchildren and such, as far as he was concerned, and he said they would become then members of the Papago Tribe. And of course that was in the original discussion. And they would have all rights to that land and other lands of the Papago like any other Papago individual. But that his one great concern was that his children

would have that land for a first right on it for as long as each and every one of them lived. And any income therefrom and so on and such, any of that, for as long as they lived. That is the best I can say." (Emphasis supplied)

Thus it has been established by the Appellant, through its own witness, that Childs did not understand what amounted to a complicated estate planning and that Mr. Lusher didn't have the competence to transmit to the government attorney what Mr. Childs was attempting to do.

In the case of KUMMROW v. BANK OF FERGUS COUNTY, 188 P. 649 (Mont. 1920), the Plaintiff filed suit to cancel a deed which she thought was a "water right location notice." The Plaintiff was unable to read or write and relied upon the representation of the parties who explained the instrument and its contents and purposes to her. The Court stated, on page 651:

"Here one of the parties was the United States Commissioner, assisting plaintiff in making her final proof, who is alleged to have made a portion of the representations, by reason of which she asserts she was deceived. Certainly those entrusted with the duty of assisting public land claimants in perfecting title to such land occupy relations of trust and confidence toward entrymen who by law transact business relating to offices."

The word "fiduciary relationship" includes legal relations, such as attorney and client, principal and agent, guardian and ward, and the like, and also every case in which a fiduciary relation exists in fact, where confidence is reposed on one

side and domination and influence result on the other. The relation need not be legal, but it may be either moral, social, domestic, or merely personal. (WENNERHOLM v. WENNERHOLM, 46 N.E.2d 939, 943, 944, 382 Ill. 254) (16-A Words and Phrases 85).

Ordinarily a "fiduciary relationship" arises where one party reposes special confidence in another or where a special duty arises on the part of one to protect the interests of another. CROCKETT v. ROOT, 146 P.2d 555, 559, 560, 194 Okl. 3.

Broadly speaking "confidential relationship" is synonymous with "fiduciary relationship." (KLEIN v. EKCO PRODUCTS CO., 135 N.Y.S.2d 391).

In the case of LILAND v. TWETO, 19 N.D. 551, 125 N.W. 1032 at page 1037, the Court determined that there was a confidential relationship existing between two parties who were not related, but who knew each other and had had previous business dealings. The Court stated as follows:

"No exact definition can be given as to what is necessary in all cases of this kind to create such relations (confidential relationship), but the trial court evidently had in mind that a marked degree of friendship or close and intimate business dealings must have existed for a time between parties to establish such conditions. This is not the meaning that should be applied in the case at bar. They rather mean that the parties do not meet upon an equality by reason of the extensive knowledge and information of one of them, and the lack of such knowledge and information, and the ability to acquire it of the other party to the trade, and that

either from the nature of the transaction or surroundings, the complainant was compelled and did place confidence in and rely on the representations made by the respondent. In the instant case, from what we have said, it is clear that Liland did repose confidence in and rely on Tweto's representations, and Tweto's knowledge of his purpose in disposing of his land and investing in the stock. He could not do otherwise if the trade was made, and the statements amounted to representations of fact which were the inducements to Liland to make the exchange. Had he know the true condition of the corporation, he would not have engaged in the transaction." Citations omitted.

In applying the laws above quoted to the facts of the case at bar, it is the position of the Appellees that due to the relationship of each of the contracting parties, the knowledge on the part of the agents of the Government and tribe, the fact that they were represented by counsel, the intent and desire of the Grantors, the confidence of the Grantors in the Government representatives, and the fact that there was great inequality as far as intellectual training and understanding of this particular type of transaction, constitutes a position of "confidential relationship."

It is concomitant that where the donee or third party occupies a confidential relationship toward the donor, a gift to the donee will be scrutinized with care and held valid only on a clear and convincing showing of the utmost good faith and an absence of all undue influence. See AMADO v. AGUIRRE, 62 Ariz. 213, 161 P.2d 117, 160 A.L.R. 1126. In the Arizona

case, supra, the Arizona Supreme Court affirmed a judgment for the defendants because the required elements were not present in Amado. Appellees assert that the Arizona rule applies in this case because there is evidence in the record to show the elements required to vitiate this transaction.

Since the Government and the Papago Tribe can act only through agents, the fact that the Government agents did not benefit is immaterial. It is of no consequence by whom the undue influence was exercised -- whether by a beneficiary or an outsider. The effect was the same. ADDIS v. GRANGE, 358 Ill. 127, 192 N.E. 774, 96 A.L.R. 607. The duty is upon the beneficiaries to vindicate the bargain or gift from any shadow of suspicion and to show that it was perfectly fair and reasonable in every effect, and the courts will scrutinize such transactions with great severity. ADDIS v. GRANGE, supra.

Thus it can be seen that the relationship between Thomas Childs and his wife, Martha Childs, and those who assisted and counseled them occupy the position of a fiduciary and the fact that Tom Childs is not a Papago Indian is immaterial, since he, his wife, and his twelve children are the object for which protection is sought.

A trust can be rescinded or reformed as is seen from the following language of the Restatement of Trusts, Sec. 333, comment c, page 149:

"c. Undue influence. Upon the question whether the settlor has been induced to create the trust by undue influence, the following factors may be of importance: (1) whether and to what extent a fiduciary or confidential relationship existed at the time of the creation of the trust between the settlor and the person persuading him to create the trust; (2) whether it was the trustee, the beneficiaries or a third person who persuaded the settlor to create the trust; (3) the improvidence of the settlor in creating the trust; (4) whether the settlor when he created the trust had independent legal advice; (5) the age, health, business competence, intelligence of the settlor; (6) whether the trust is of such a character that it would be natural for a person in the position of the settlor to create it when not unduly influenced by others."

RESPONSE TO SPECIFICATION OF ERROR NO. 5

The fourth area covered in the Government's Specification of Errors relates to Specification No. 5, being the condition set forth in paragraph 9 (4) of the Offer to Sell.

SUMMARY OF ARGUMENT

The court was correct in holding that the non-performance of a condition within a reasonable time and prior to the death of the offerers vitiated the contract.

A provision of the Offer (Ex. C) sets forth the length of time the Offer would be open for acceptance. This is found on page 2, paragraph 6 of the Offer to Sell Lands to the United States as follows:

"*** This offer shall remain open for 6 months, and shall remain open an addi-

tional 3 months, unless 30 days prior to the original expiration date notice is communicated to the Secretary that his extension shall not be effective."

A resolution was passed on April 4, 1947 (Ex. B) by the Papago Council, whereby the Council agreed to accept the conditions of the Offer of Thomas and Martha Childs. One of the conditions imposed by them was that their children be enrolled as members of the Papago Tribe. (See conditions 4 and 6 in paragraph 9 of Exhibit C). It should be noted that the terms of the Offer do not state that a promise to adopt the children or a resolution to adopt the children is satisfactory. The conditions stated that the conveyance is contingent upon the enrollment of the Grantors' children into the Papago Tribe, and therefore one of the conditions of the Offer and the trust was the act of adoption, not the promise. This act of adoption was performed almost eleven years after the Offer was terminated by its own terms or by the death of both Grantors or the execution of the Will of Grantor Thomas Childs, showing his intent to withdraw the Offer.

This act was not performed until 1958. Since the act of acceptance (enrollment) did not take place within the specified period of the nine months or even within the lives of the Grantors, the condition precedent did not occur and the trust never vested but failed, entitling the heirs of the Grantors

to the estate in accordance with the Will of Thomas Childs.

See also NESBITT v. EISENBERG, 139 S.2d 724 (Fla. 1962); LANGE v. HOUSTON BANK AND TRUST COMPANY, 194 S.W.2d 797, 801 (C.C.A., Tex. 1948).

If the Offer and the trust conveyance are construed to be subject to a condition subsequent (the enrollment), the trust must fail and the interest revert to the heirs of the Grantors. A leading Arizona case dealing with a contingent trust is DREYER v. LANGE, 74 Ariz. 39, 243 P.2d 468 (Ariz. 1942). In the Dreyer case, the settlor conveyed all of her property to the trustee with the reservation of a designated income for life. She further reserved the right to designate the beneficiaries under the trust, either by will or other suitable instrument in writing. Then she stated in the trust agreement that if she did not so designate the beneficiaries, the corpus of the trust would go to her heirs on the Dreyer side of her family. The trust instrument contained this sentence:

"This trust shall be considered to be irrevocable."

The Plaintiff sought to revoke the trust. On page 469, the Court pointed out that the counsel agreed to one element of the law:

"...that if appellee (settlor) is the sole beneficiary under the trust created, she has the right to revoke it at any time whether the purposes of the trust have been accomplished or not and even though the trust is declared to be irrevocable."

The Court reasons on page 470 that legal title to the property vested in the trustee during the life of the settlor, but there was no vested interest in any one other than the settlor as far as beneficiaries are concerned for the reason that there was a condition which must occur or a contingency which must occur prior to the vesting; namely, the act of designating the beneficiaries. The Court states on page 471, as follows:

"We therefore hold that unless a conveyance of an expectant estate in trust is based upon a contingency that must inevitably happen, no vested interest in a future estate is created and that the person named therein does not become a beneficiary in law until the contingency happens."

The case at bar is very similar. An offer was executed which was to remain open for a period of nine months. The trust would vest upon the happening of a contingency; namely, the enrollment of the children of the Grantors as members of the Papago Tribe. As in the Dreyer case (supra), this was a contingency that might never occur. In fact, the enrollment of the children did not occur until eleven years after the Offer was made and seven years after the death of the Grantors. The important element, though, is that it might never have occurred. As the Court points out in the Dreyer case, since it is a contingency that may never occur, there is no vested interest.

If the Court construes, in the case at bar, the Offer between Thomas and Martha Childs, which was signed on February

10, 1947, to be an offer to create a trust in return for the consideration that the children of Thomas and Martha Childs be enrolled as members of the Papago Tribe, and the Court then determines that this enrollment did not take place within the time period (nine months) as set forth in the contract, the Offer was terminated by the end of the nine months' period and the trust failed for lack of consideration leaving Appellant unentitled to any relief. The failure of consideration is such as to affect and defeat the object of the contract.

If the Offer of the Grantors and the instrument of conveyance are interpreted to be the creation of a trust subject to a condition precedent and the condition did not occur within the time specified, the trust fails.

In the case of LANE v. LOUIS TRUST COMPANY, 201 S.W.2d 288 (Mo. 1947), the decedent established a trust fund for her husband with an agreement that if she predeceased him he would be entitled to the trust fund if he waived his right in writing to any interest he might have in the remainder of her estate. The Court determined that there was no vested interest in the trust due to the fact that the act of waiver by the husband constituted consideration for the offer and that since this act was not performed within the necessary time, there was no consideration for the agreement, the trust interest never vested and therefore failed and finally the trust fund was directed to

to be distributed to her heirs. The Court states, on page 290, as follows:

"The trust instrument did not grant to the husband any vested interest in the wife's property or in the trust fund. It did not amount to a contract. It was an offer by her to him that if he survived her he could take the trust fund upon consideration that he waive his marital rights in her estate. In order for the offer to be translated into a binding contract between the surviving husband and his wife's estate, there must have been, at the time of acceptance, a valid consideration upon which the contract could rest."

The resolution passed on April 4, 1947 did not constitute an acceptance of the Offer. The Supreme Court of the State of Arizona, in the case of CLARK v. COMPANIA GANADERA DE CANANEA, S.A., 385 P.2d 691, 92 Ariz. 391, opinion supplemented 387 P.2d 235, 95 Ariz. 90 (1963), states, on page 697, as follows:

"An acceptance must comply exactly with the requirements of the offer, omitting nothing from the promise or the performance requested. Re-statement, Contracts, Section 59 (1932)."

The Court goes on to approve this principle of law:

"It is the position of the appellees that should there be found an acceptance, it was, nevertheless, not communicated to Texas Order Bind Co. and without the communication of the acceptance of an offer, the contract does not come into being, Groskin v. Bookmyer, 310 Pa. 588, 166 A. 233 (1933)."

In the case at bar, the acceptance of the Offer was expressly made to be contingent upon the act of enrolling the children of the Grantors as members of the Papago Tribe within

the specified time limit, nine months. The Government has admitted that no notice of the enrollment of the children was ever given to them or to anyone else.

Nowhere in the record can any criticism be made against Thomas or Martha Childs, although the Appellant, on page 13 of its brief, seems to believe that some detriment was suffered by Appellant or the Tribe because the 1940 tribal census supposedly included the children. This position is untenable because if the children already had some rights of formal enrollment in 1940, why did the government attorney put this as a condition in the Offer in 1947, and why was formal enrollment enacted by a resolution in 1958?

The death of the offerer terminates the offeree's power of acceptance. In the case at bar, both of the offerers were deceased prior to the acceptance of the Offer by the enrollment of the Offerers' children as members of the Papago Tribe.

Corbin, in his Treatise on Contracts, Vol. 1, Section 54, states as follows:

"It is very generally said that the death of the offerer terminates the offeree's power of acceptance even though the offeree has no knowledge of such death."

See also: 17 Am.Jur.2d, Contracts, Sec. 38, p. 377.

CONCLUSION

The Court, in its 16 Findings of Fact and 9 Conclusions of Law, has approached every aspect of the case that was found

to be in issue. The Court has considered the issues of undue influence, quasi-fiduciary relationship, the condition in the Offer to enroll the children, the entire Offer and deed, the circumstances surrounding the transaction, the consideration, the ambiguity, the failure of performance, the intent of the parties, and every other facet of the case. In addition, the Court considered the preparation of the documents and it is basic Horn Book law that the documents are construed most strongly against the person who prepared them -- in this instance the Government.

It is inescapable that the Court, in Conclusion III, concluded that there was no meeting of the minds between Thomas Childs, Jr. and his wife, Martha, and the plaintiff with relation to the transaction. Perhaps the Court could have decided the case only on this issue, but it felt compelled to view all of the issues as it has done.

Based upon the trial court's findings of fact, which are amply supported by a preponderance of the evidence, and the rules of law applicable to those facts, as set forth in this brief, Appellees respectfully pray that the Judgment entered by the United States District Court for the District of Arizona, sitting at Tucson, Arizona, be affirmed.

Respectfully submitted

BARBER & HARALSON
CUSICK, WATKINS & STEWART
Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Frank H. Watkins, Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH JUDICIAL CIRCUIT

DOUGLAS W. HALL,

Appellant,

vs.

No. 22603 ✓

LAWRENCE E. WILSON, Warden,
California State Prison,
Tamal, California,

Appellee.

APPELLEE'S BRIEF

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FILED

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH JUDICIAL CIRCUIT

DOUGLAS W. HALL,)	
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Appellant,)	
)	
vs.)	No. 22603
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LAWRENCE E. WILSON, Warden,)	
California State Prison,)	
Tamal, California,)	
)	
Appellee.)	
<hr/>		

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for writ of habeas corpus was conferred by Title 28, U.S.C., section 2241. The jurisdiction of this Court is conferred by Title 28, U.S.C., section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

Proceedings in the State Courts:

Appellant was convicted in the superior court of the State of California for the County of Yolo on May 5, 1965, of violating Penal Code section 211: to wit, armed robbery (CT 102). Appellant's request to file a late notice of appeal was denied by the California Court of Appeal. On April 4, 1966, appellant petitioned the Marin County Superior Court for a writ of habeas corpus. On May 11, 1966, appellant

petitioned the Court of Appeal for a writ of habeas corpus. On June 1, 1966, appellant petitioned the California Supreme Court for a writ of habeas corpus. The petitions were denied in all three cases (CT 4-6).

Proceedings in Federal Court:

On August 3, 1966, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California (CT 1-19). On December 14, 1966, the District Court issued an order denying the petition (CT 20, 21). On December 16, 1966, appellant filed a supplemental points and authorities (CT 22-37). On February 13, 1967, the District Court issued an order to show cause (CT 38). On March 21, 1967, appellee filed a return to the order to show cause (CT 41-104). On April 14, 1967, appellant filed a traverse to the return (CT 107-122).

On January 15, 1968, the District Court issued an order discharging the order to show cause and denying appellant's petition (CT 141-148). On February 5, 1968, appellant filed an application for a certificate of probable cause (CT 149-161). On February 8, 1968, an order was entered granting the appellant's application for a certificate of probable cause and allowing him to appeal in forma pauperis (CT 166).

SUMMARY OF APPELLANT'S ARGUMENTS

1. Appellant's arrest was illegal and without jurisdiction, that the evidence the warrant was based on was insufficient to satisfy the proscription of California Penal Code section 1551, which the warrant was issued under. Therefore, the warrant was void for lack of jurisdiction.

2. The search of his automobile was illegal for lack of probable cause. Subsequent seizure of property from within the automobile was also illegal. Therefore, rendering all fruits of said search and seizure inadmissible, unlawful, and unconstitutional.

3. Appellant's not being afforded counsel at arraignment on the (1551) extradition matter was prejudicial and detrimental.

4. The fruits of the illegal search and seizure were responsible for appellant being compelled to appear in a number of line-ups at the Solano County Jail, which subsequently led to his being identified from line-up as one of two men who had allegedly robbed the Hi-way Market in Yolo County on the evening of April 1, 1965.

5. The threat of additional charges being filed against appellant if he did not cooperate, was coercive, unlawful, and unconstitutional. Appellant was unaware of the laws concerning multiple punishments. He was lead to believe that multiple charges could and would be filed against him should he go against the wishes of the officers.

6. The testimony of the one State's witness, the only one of the three witnesses for the prosecution who even claimed to identify this appellant was in itself insufficient to support the charge of first degree robbery for which appellant stands convicted.

7. Appellant was not effectively informed of his constitutional rights under the Dorado rules. That he was coerced into making a statement to the officers and said

statement was involuntary and therefore unconstitutional.

8. That said statement was in part, brought about by the unlawful threat of having more charges filed against him should he fail to cooperate. Said threat could not have (lawfully) been carried out, therefore, amounted to coercion and duress.

9. That he did not receive proper and effective aid of counsel from the Public Defender, Mr. Joe Martin, who was appointed to represent appellant in the Yolo County Court proceedings. That said counsel did not investigate the case, the possible defenses, nor did he advise the appellant of any possible defenses. That said counsel was more interested in the co-defendant's wife, than he was in defending the appellant and his co-defendant as he had been appointed to do.

10. That this combination of circumstances, all of which were illegal, were responsible for the guilty plea of appellant. That under these circumstances he felt that he had no alternative but to plead guilty.

11. That the District Court erred in not either granting the writ and reversing the conviction, or in the alternative, granting an evidentiary hearing to resolve the foregoing issues.

SUMMARY OF APPELLEE'S ARGUMENT

I. Appellant's plea of guilty was voluntary and properly received by the trial court.

A. Appellant's plea of guilty was not induced by any evidence obtained in violation of his constitutional

rights.

B. No statements were taken from appellant in violation of either his Fifth or his Sixth Amendment rights.

II. Appellant was adequately represented by his trial counsel.

III. Appellant was not prejudiced by not being represented by counsel at the arraignment for extradition.

ARGUMENT

I.

APPELLANT'S PLEA OF GUILTY WAS VOLUNTARILY AND PROPERLY RECEIVED BY THE TRIAL COURT.

Appellant's essential contention appears to be that he was improperly induced to plead guilty to the charge for which he stands convicted. He alleges, that he made incriminating statements to certain police officers without being first warned of his constitutional rights. He also alleges that the police unlawfully searched his vehicle and seized certain items of evidence. He now claims that he pleaded guilty because he knew that the prosecuting authorities possessed this improperly obtained evidence.

A. Appellant's plea of guilty was not induced by any evidence obtained in violation of his constitutional rights.

It might be helpful at this point to state a short summary of the facts surrounding the arrest of appellant. Appellant claims that he and his co-defendant Rives, were arrested inside a coffee shop in Vallejo, California, on the night of April 1, 1965; that they were then taken to

Vallejo Police Station and shown a photocopy of telegrams from Texas, which showed warrant numbers and requested the arrest of appellant and Rives; that they were then questioned concerning a bag of money and guns that the police had seized from the automobile, which had been parked in an adjoining parking lot next to the coffee shop; that later on April 2, 1965, appellant was identified from a line-up as one of two men who had allegedly robbed a food store in Yolo County on April 1, 1965; that after the identification, he was questioned by two officers from Yolo County concerning the robbery; that he made a confession to the officers concerning the robbery of the Hi-way Market in Yolo County; and that, just prior to his preliminary hearing, he saw an officer standing near the courtroom door with a gun that had been seized from his automobile.

The district court ruling on this point stated:

"Generally, the conviction and sentence which follow a plea of guilty are based solely upon said plea and not upon any evidence which may have been improperly acquired by the prosecuting authorities. Wallace v. Heinze, 351 F.2d 39 (9th Cir. 1965). An exception to this rule is that, where the plea of guilty is induced by a coerced confession, or in some other respect not truly voluntary, then such plea cannot stand. 'The distinction is,' according to the Ninth Circuit in Doran v. Wilson, 369 F.2d 505, 507 (9th Cir. 1966) 'that if such a violation is not claimed to be, or, if so claimed, is not what

induced the plea, then reliance upon the violation in habeas corpus by the one who pleaded guilty is not justified because it is the plea, not the deprivation of constitutional right, that brought about the conviction, while the plea can be upset if it was induced by the violation.'

"The court in Doran, supra, however, made it clear that a plea of guilty can still be free and voluntary even though a violation of one's constitutional rights had occurred.

"In the instant case it is clear from the petition, even assuming that evidence had in fact been illegally seized from petitioner's car, that the plea of guilty was motivated, not only by the illegally seized evidence, but also because of the implied threat of more charges being filed against him, petitioner's hope that he might be granted probation, the testimony of the eye witness at the preliminary hearing, and petitioner's confession, which this Court has already above held to have been lawfully obtained under the standards set forth in Escobedo v. Illinois, supra." (CT 146:16-32-147:1-12).

The Court went on to say:

"On the basis of the Reporter's Transcript and the petition itself, this Court concludes that petitioner is not entitled to relief. The plea was both intelligent and informed, and no hearing is required to establish that fact. See Grove v.

Wilson, 368 F.2d 414 (9th Cir. 1966). Nowhere in the petition does petitioner contend that the plea was involuntary." (CT 147:26-32).

Appellant's allegation of an induced plea is, as previously indicated, predicated at least in part upon a claim of an illegal search and seizure. However, appellee submits that even assuming, arguendo, that the facts are as stated by the appellant that any search conducted by the police would have been valid as incident to a lawful arrest.

In Preston v. United States, 376 U.S. 364, 366 (1964), the United States Supreme Court reiterated that a search of an automobile must meet the test of reasonableness required by the Fourth Amendment before evidence obtained during the course of a search may be admitted at trial. However, the Court also stated at pages 366-367 that:

"Commonsense dictates, of course, that questions involving searches of motor cars or other things readily moved cannot be treated as identical to questions arising out of searches of fixed structures like houses. For this reason, what may be an unreasonable search of a house may be reasonable in the case of a motor car." See also Cooper v. California, 386 U.S. 59, 87 S.Ct. 788, 790 (1967).

In Preston, the defendants had been arrested for vagrancy, taken to the police station and booked. Their vehicle had been driven to the police station and then towed to a garage. Subsequently, the police officers went

to the garage, searched the vehicle and discovered evidence which was used against the defendants in a subsequent federal prosecution for conspiring to rob a bank. The court held that the warrantless search was too remote in time and place to be incident to the arrest and therefore failed to meet the test of reasonableness. Preston, supra, at 367. However, it appears relevant to note that in the course of its opinion the Court stated that it assumed the police had a right to search the car when they first came on the scene. Preston, supra, at 367-68.

Cases arising since Preston have required the courts to apply its holding to various fact patterns. In Crawford v. Bannon, 336 F.2d 505 (6th Cir. 1964), the court considered the situation where the police searched the suspect's vehicle at the scene of arrest after he had been removed in the patrol wagon. The search was found to be incident to and substantially contemporaneous with the arrest. Citing Rabinowitz v. United States, 339 U.S. 56, 64 (1950), which was also cited in Preston the court determined that the officers were not required to obtain a warrant, even though they may have had time to do so, as long as the search was otherwise reasonable. In Adams v. United States, 336 F.2d 752 (D.C. Cir. 1964), the court after a comprehensive analysis of cases dealing with this question pointed out that there appears to be no case which holds improper a search of an auto at the time and place its occupants are placed under lawful arrest.

Applying the above to the instant case, the

appellee submits that the search of appellant's vehicle was perfectly proper.

B. No statements were taken from appellant in violation of either his Fifth or Sixth Amendment rights.

The appellant also contends that his plea of guilty was induced because of a statement he gave to the police within a day or so after his arrest. He alleges that he was not given the warning required by Miranda v. Arizona, 384 U.S. 436 (1966). Appellee submits, however, that Miranda is not applicable because the judgment was entered in petitioner's case on May 5, 1965. See Johnson v. New Jersey, 384 U.S. 719, 734 (1966).

The District Court concluded that Miranda v. Arizona, supra, was not applicable to the instant case and stated:

"While the requirements of Escobedo v. Illinois, 378 U.S. 478 (1964), would be applicable to petitioner's case, it is clear that Escobedo requires that a request for counsel be made by the person being interrogated. See Manning v. California, ___ F.2d ___, (9th Cir., No. 21484, May 15, 1967).

"In the instant case petitioner does not allege that he requested counsel at the time of the interrogation by the Yolo County officers.

"In any event, this Court concludes, on the basis of petitioner's own contradictory statements above set forth, that even had petitioner requested counsel, the requirements set forth in Escobedo, supra, were complied with in this case." (CT 145:17-31).

II.

APPELLANT WAS EFFECTIVELY REPRESENTED
BY TRIAL COUNSEL.

Appellant contends, essentially in a conclusionary manner, that he was not effectively represented by counsel. However, appellant has a heavy burden to sustain when making such an allegation and must show that counsel was, "so incompetent or inefficient as to make the trial a farce or a mockery of justice." Reid v. United States, 334 F.2d 915, 919 (9th Cir. 1964); Peek v. United States, 321 F.2d 934, 944 (9th Cir. 1963). Appellee submits that the appellant has failed to sustain the burden here required.

The District Court commenting on this claim stated:

"It is the conclusion of this Court that, based upon the Reporter's Transcript of petitioner's arraignment, preliminary hearing and plea on the robbery charge in Yolo County Superior Court, petitioner has failed to allege a prima facie showing that his counsel was not 'rendering reasonably effective assistance' within the constitutional sense so as to justify the holding of an evidentiary hearing. Brubaker v. Dickson, 310 F.2d 30, 37 (9th Cir. 1962)." (CT 144:22-29).

III.

APPELLANT WAS NOT PREJUDICED BY
NOT BEING REPRESENTED BY COUNSEL
AT THE ARRAIGNMENT FOR EXTRADITION.

It is appellant's final contention that the denial of counsel at the arraignment on extradition was prejudicial

and detrimental.

The district court in dealing with this question stated:

"With respect to petitioner's assertion that he was without the assistance of counsel during his arraignment, petitioner fails to allege that he was in any way prejudiced thereby. The record shows that the complaint was dismissed by the Solano Municipal Court and, accordingly, this Court concludes that this contention is without merit." (CT 144:16-21).


CONCLUSION

For the foregoing reasons, the appellee respectfully submits that the order of the district court denying appellant's petition for a writ of habeas corpus should be affirmed.

DATED: June 5, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
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Deputy Attorney General


Attorneys for Appellee

RHK:lp

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: June 5, 1968.


RONALD H. KEARNEY
Deputy Attorney General

BRIEF FOR RESPONDENT, FEDERAL MARITIME COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,604

JUL 8 1968

MATSON NAVIGATION COMPANY,

Petitioner,

v.

FEDERAL MARITIME COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

FILED

MAY 22 1968

WM. B. LUCK, CLERK

ON PETITION TO REVIEW AN ORDER
OF THE FEDERAL MARITIME COMMISSION

JAMES L. PIMPER
General Counsel

ROBERT N. KATZ
Solicitor

Washington, D.C.
May 20, 1968

Federal Maritime Commission

QUESTIONS PRESENTED

1. Whether an agreement to merge between two or more common carriers by water is an agreement subject to section 15 of the Shipping Act, 1916 (46 U.S.C. §814) which the Commission should approve or disapprove depending on its findings in connection therewith?
2. Whether there was sufficient basis for the Commission in the exercise of its administrative discretion to grant approval of Agreement No. 9551?

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COUNTERSTATEMENT OF THE CASE

This is a petition to review a supplemental report of the Federal Maritime Commission (Commission) issued and served on December 26, 1967, pursuant to the Shipping Act, 1916, c. 451, 39 Stat. 728, 46 U.S.C. §801 et seq. The order was issued in the Commission's Docket No. 66 45. Jurisdiction to review the Commission's order is conferred on this court pursuant to 28 U.S.C. §2341 et seq.

Prior to the issuance of the supplemental report here under review, the Commission issued a report, served on October 3, 1967, in which, by a three to two decision, the Commission held that an agreement for consolidation or merger was that type of agreement which is included within its jurisdiction provided by section 15 of the Shipping Act, 1916. At that time, however, the Commission decided that the proceeding should be remanded to the hearing examiner for the taking of further evidence.

On November 17, 1967, the Commission favorably considered a petition for reconsideration of the October 3 report. As a result of such reconsideration the supplemental report here under review was issued on December 26, 1967.

The Commission, in the supplemental report, adopted the hearing examiner's findings and conclusions in granting approval of Agreement No. 9551. That agreement provides for activities of American Mail Line, Ltd. (AML), American President Lines, Ltd. (APL) and Pacific Far East Lines, Inc. (PFEL) which lead to the consolidation or merger of the three. (R. Ex. 14, pp. 2-4). Each of the three are common carriers by water within the meaning

of the Shipping Act, 1916. Effective control of the three carriers is in the Natomas Company. (S.R.-5).

Under Delaware law, AML may be merged into APL pursuant to a "merger" procedure. Accordingly, Agreement No. 9551 is not essential to the merger of AML into APL. (S.R.-6).

The hearing examiner issued extensive findings concerning the services of the three companies and corporate structure, management, operations and financial conditions. In addition, he examined and reached findings concerning the benefits which might flow from a merger pursuant to Agreement No. 9551. The hearing examiner noted that there was no shipper or port testimony or argument for or against the merger. Other than opposition to the approval of Agreement No. 9551 on jurisdictional grounds, the only opposition to the merger came from States Steamship Lines and Matson Navigation Company. The examiner received extensive testimony and other evidence concerning the business of the carriers' opposing the merger, the potential impact of the merger upon these carriers, and the potential injury. The examiner considered antitrust principles as well as sound transportation justifications in arriving at a conclusion that the Agreement should be approved. He found that the merger would not tend to create a monopoly or lessen competition except for elimination of service competition among the three merging carriers and that ample competition would remain in the services. (S.R.-41). He further concluded from the record that substantial economies and efficiencies of scale would result from the proposed merger. The Commission in upholding approval of Agreement No. 9551 examined the record, the findings and conclusions of the hearing examiner and adopted

them as its own. No exceptions had been taken to the findings of fact upon which the examiner reached his conclusions.

The Commission's approval of Agreement No. 9551 was by a three to two decision. One commissioner dissented on the basis that jurisdiction did not lie under section 15 of the Shipping Act. The other commissioner dissented on the basis that the proceeding should have been remanded to the examiner for the taking of further evidence. Commissioner Fanseen, who had earlier voted against disapproval on the basis of lack of jurisdiction, voted on reconsideration to approve Agreement No. 9551 since three of his colleagues had concluded that the Commission would have jurisdiction to approve or disapprove Agreement No. 9551. Based upon that finding of jurisdiction Commissioner Fanseen felt that there was sufficient basis in the record for the Commission to grant approval to Agreement No. 9551.

SUMMARY OF ARGUMENT

The legislative history not only of the Shipping Act, 1916, but also of amendments to section 7 of the Clayton Act and later amendments to the Shipping Act, 1916, all support the conclusion that Congress intended that merger agreements were the type of agreements which were subject to approval or disapproval pursuant to section 15 of the Shipping Act, 1916. The pronouncement of courts that exemptions from antitrust laws are not to be freely construed is not repudiated by this conclusion. It is clear that failure to comply with the Shipping Act, 1916 would expose parties subject thereto to remedies and sanctions provided by the antitrust laws as well as the Shipping Act, 1916. A reasonable interpretation of the statute herein involved leads only to the conclusion that mergers are among the types of agreements included within section 15. Ancillary issues raised by petitioner, Matson, are not germane to the proceeding before this court. Finally, the Commission, though not bound to adhere strictly to antitrust principles, examined the agreement herein involved, engaged in deep and penetrating analysis of the facts herein involved and examined these facts in the light of antitrust principles. There is ample evidence and basis in the record to support the Commission's conclusion. Accordingly, the order of the Commission should be affirmed.

ARGUMENT

Introduction

There is a valid basis upon which the Commission determined that this type of agreement was that which falls within section 15 of the Shipping Act, 1916 and is subject to approval or disapproval. The legislative history would verify this. A practical reading of the statute confirms a logical analysis that demands this conclusion. The Commission having jurisdiction to review this type of agreement and approve or disapprove it was justified in granting approval based upon the evidence before it. In the exercise of sound administrative discretion the Commission found ample justification for approving Agreement No. 9551.

I. LEGISLATIVE HISTORY OF SECTION 15, SHIPPING ACT, 1916 DOES NOT PRECLUDE REVIEW AND APPROVAL OF ANTICOMPETITIVE AGREEMENTS WHICH TAKE THE FORM OF MERGER AGREEMENTS.

The Shipping Act was passed following extensive hearings and extensive investigation by the House Committee on Merchant Marine and Fisheries (known as the Alexander Committee). The Committee was concerned that rate wars and other anticompetitive practices then prevalent or possible in the merchant marine industry would lead to ruinous competition which would ultimately be a creation of a monopoly as effective as that which could exist by agreement. (H.Doc. No. 805, 63d Cong., 2d Sess., p. 416). The fact that the Alexander Committee expressly indicated concern with creation of monopolies but did not outlaw monopolies in the maritime industry makes it clear

that the Committee intended that the FMC review anticompetitive agreements. Specific acts and practices were prohibited by the Alexander Committee, such practices including use of fighting ships, rebating, etc. It can reasonably be presumed that the Committee, by not outlawing merger agreements, intended to have such agreements approved by the Commission. The Department of Justice points out (D.J. Br. 27), that the Panama Canal Act of 1912 made it unlawful for any railroad to own, control or have interest plus stock ownership or otherwise in any common carrier by water operating through the Panama Canal or elsewhere with which the railroad may compete. The fact that mergers or common ownership were not outlawed in the Shipping Act, which so closely in time followed the Panama Canal Act, would indicate that the Congress, rather than not intending to include mergers under the Shipping Act merely intended not to outlaw mergers unequivocally. Had Congress intended that mergers not be subject to review by the Commission it would undoubtedly have said so, since it provided for review of any and all anticompetitive devices. To argue that the silence of the Shipping Act on mergers indicates that Congress did not intend to include mergers under the Shipping Act is reading very much more into the statute than can reasonably be contemplated. Such failure to specifically mention mergers merely indicates that Congress concluded that mergers were an anticompetitive device.

Thus, the mere fact that the Alexander Committee was concerned with slowing down the movement toward consolidation cannot be a basis for concluding that the Commission, which was to review and control all other anticompetitive combinations, was not to apply its administrative expertise to the control of

mergers or consolidations. The Supreme Court has recognized that the Shipping Act of 1916 was intended to vest within the Commission the responsibility for pervasive control over anticompetitive conduct of an industry. Volkswagenwerk Aktiengesellschaft v. FMC and USA, et al., 390 U.S. 261 (1968), No. 69, decided March 6, 1968. The Department of Justice noted that in its brief before the Supreme Court in the Volkswagen case it pointed out (by way of footnote) that the FMC had no express authority to approve mergers. That same brief, however, urged successfully the submission to Commission scrutiny in advance of implementation all other agreements which present a Sherman Act question. In finding that the Commission should not take a restrictive view of its jurisdiction the Court clearly did not endorse the contention that the Commission did not have jurisdiction to approve mergers. Rather, the Court stated:

"The Commission thus took an extremely narrow view of a statute that uses expansive language. In support of that view, the Commission argued in this Court that a narrow construction of §15 should be adopted in order to minimize the number of agreements that may receive antitrust exemption. However, antitrust exemption results not when an agreement is submitted for filing, but only when the agreement is actually approved; and in deciding whether to approve an agreement, the Commission is required under §15 to consider antitrust implications. FMC v. Aktiebolaget Svenska Amerika Linien, post, at ____; see also Isbrandtsen v. United States, 211 F.2d 51.

"The Commission itself has not heretofore limited §15 to horizontal agreements among competitors, but has applied it to other types of agreements coming within its literal terms. See, e.g., Agreements Nos. 8225 and 8225-1, Between Greater Baton Rouge Port Commission and Cargill, Inc., 5 F.M.B. 648 (1959), affirmed, 287 F.2d 86, and Agreement No. T-4: Terminal Lease Agreement at Long Beach, California, 8 F.M.C. 521 (1965), applying §15 to lease agreements. In the latter case, decided only four months before its decision in the case before us, the Commission said:

'Section 15 describes in unambiguous language those agreements that must be filed; it does not speak of agreements per se violative of the Sherman Act. Since the wording of section 15 is clear, we need not refer to the legislative history; there is simply no ambiguity to resolve.' 8 F.M.C., at 531.

"To limit §15 to agreements that 'affect competition,' as the Commission used that phrase in the present case, simply does not square with the structure of the statute." (Footnotes omitted).

It is argued that the decision in Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966), supports the proposition that antitrust laws supersede the Shipping Act, 1916. This is simply not so. Carnation merely holds that in the event that parties subject to the Shipping Act of 1916 do not comply with the provisions of that Act they will not only be subject to the penalties provided by that Act but, not having perfected an antitrust exemption, will also be subject to the penalties provided by the antitrust laws. This does not verify a narrow reading of the jurisdiction granted by Congress in enacting section 15 and does not bear upon the issue here.

The legislative history which most directly deals with this issue is found in the history of the 1949 amendments to section 7 of the Clayton Act, 15 U.S.C. 18.

In 1949, Congress was taking steps to plug the loopholes in section 7 so as to bring within its scope the entire range of corporate amalgamations, including assets, acquisitions, and mergers, as well as the stock acquisitions, which alone had been covered. Between 1914, when the section was originally enacted, and 1949, several

agencies had been created or given additional authority. These included the Civil Aeronautics Board, the Federal Communications Commission and the Federal Power Commission, as well as the Federal Maritime Commission's predecessors; and the Interstate Commerce Act had been amended to cover mergers and acquisitions of control (49 U.S.C. 5). To make it clear that the amendment of section 7 would not affect the authority of these agencies over mergers, the following was added to section 7:

"Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board."

In the version first passed by the House, the amending bill (H.R. 2734) omitted reference to the Commission's predecessor. Under date of September 29, 1949, the Commission, by its Vice Chairman, called this omission to the attention of the Senate Committee.^{1/} After stating the Commission's understanding that the Clayton Act amendment would prohibit certain asset

^{1/} "The attention of the Maritime Commission has been called to the provisions of the bill H.R. 2734, now under consideration by your subcommittee. Among other things, this bill would amend section 7 of the Act of October 15, 1914 (the Clayton Act), to prohibit certain corporations from acquiring the assets of competing corporations where in any section of the country the effect of such acquisition would be substantially to lessen competition or tend to create a monopoly. The bill would also add a new paragraph to section 7 to provide that nothing contained in such section shall apply to transactions duly consummated pursuant to authority given by certain specified Federal commissions and agencies under any statutory provision vesting such power in such commission or agency. (Footnote continued on next page).

acquisitions, the letter described the provisions of section 15 of the Act with respect to the filing and approval or disapproval by the Commission of any agreement among carriers or other persons subject to the Act "if such agreement, among other things, is one 'controlling, regulating, preventing, or destroying competition;'" and noted that approved agreements were expected from the antitrust laws. A copy of the pertinent provisions of section 15 was attached. The letter suggested that the Commission be included among the agencies specifically listed in H.R. 2734. It noted that H.R. 2734 did not appear to affect the section 15 exemption provision, but suggested that inclusion of the Commission among the agencies mentioned would avoid controversy arising from any contention that failure to do so made approved section 15 agreements subject to the provisions of section 7

1/ Continued:

"Section 15 of the Shipping Act, 1916, as amended, which is administered by the Maritime Commission, requires every common carrier by water or other person subject to the Act to file with the Commission any agreement with another such carrier or other person subject to the Act if such agreement among other things, is one 'controlling, regulating, preventing or destroying competition'. The Commission has authority to disapprove any such agreement 'that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment to the commerce of the United States, or to be in violation of this Act.' Agreements approved by the Commission under this provision are 'excepted from the provisions of the Act approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', and amendments and Acts supplementary thereto, and the provisions of sections 73 and 77, both inclusive, of the Act approved August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the government, and for other purposes', and amendments and Acts supplementary thereto' (commonly referred to as anti-trust laws). A copy of the pertinent provisions of section 15 of the Shipping Act is submitted herewith for your reference."

of the Clayton Act. Obviously such agreements could not be subject to section 7 unless they were merger agreements of one kind or another.

The Senate Committee thereupon amended H.R. 2734 to include the Commission among the agencies listed in the above quoted paragraph of section 7. In its Report No. 1775 (81st Cong., 2d Sess., June 2, 1950), the Committee on the Judiciary noted (p. 2):

"The purpose of the amendments is to include in the bill the recommendations of the United States Maritime Commission and the Securities and Exchange Commission, which the committee believe to be justified. . . ."

The Committee's Report also noted (p. 7):

"The Maritime Commission, at its request has been included in the category of agencies to which the act does not apply when transactions are duly consummated pursuant to authority given to that Commission. In making this addition, however, it is not intended that the Maritime Commission, or, for that matter, any other agency included in this category, shall be granted any authority or powers which it does not already possess."

Of course, the amendment did not add to the Commission's jurisdiction nor, as the letter made clear, did the Commission expect it to. Thus, Congress was aware that the Commission claimed such jurisdiction under section 15 in a carefully prepared and documented letter. Congress thought the inclusion of the Commission in section 7 to be "justified" and has not seen fit to change its position since then. But it is argued that any reliance of section 7 for merger jurisdiction is misplaced and that Congress, in at least two instances, included agencies in section 7 which were later determined by the Supreme Court to have no such jurisdiction. See Milk Producers Assn. v. US, 362 U.S. 169 (1961) and California v. Fed. Power Comm'n., 369 U.S. 482 (1962).

In Milk Producers, there was no statutory provisions vesting power in the Secretary of Agriculture to approve the transaction in question and thus immunize it from the antitrust laws. In the California case, while the Power Commission had the statutory authority to approve the acquisition of one natural gas company by another, its approval did not exempt the transaction from the antitrust laws. The Supreme Court in that case simply held that the Commission should have stayed its hand and not acted during the pendency of an antitrust suit in the district court over the same transaction. Mergers, as agreements requiring approval under section 15 are, upon such approval, expressly exempted from the provisions of the antitrust by the language of that section.

In 1956, the Federal Maritime Board, advised the Senate Subcommittee on Antitrust and Monopoly that "merger agreements approved by the Board . . . and the resulting mergers, are exempt from section 7."^{2/} In 1962, the Chairman of the Commission reported to the Antitrust Subcommittee of the House Judiciary Committee that "section 15 and our decision in the Isbrandtsen-Export merger case constituted notice that merger agreements must be filed with the Commission and that it is unlawful not to file such agreements promptly or to carry out such agreements prior to Commission approval."^{3/} It may be noted that the "Celler Report" issued in March 1962,

^{2/} Hearings on Legislation Affecting Corporate Mergers, Senate Judiciary Committee, Subcommittee on Antitrust and Monopoly, 84th Cong., 2d Sess. (1956) at 527.

^{3/} Progress Report, Federal Maritime Commission, Hearings before the Antitrust Subcommittee of the House Judiciary Committee, 87th Cong., 2d Sess., (1962) at 1.

referred to the AEIL transaction recently approved by the Federal Maritime Commission without questioning the Commission's jurisdiction.^{4/}

II. EXCLUDING MERGERS FROM THAT TYPE OF AGREEMENT WHICH MUST BE SUBJECTED TO SCRUTINY UNDER SECTION 15 WOULD BE TO ELIMINATE MEANINGFUL REGULATION.

While Congress viewed joint rate making as a lesser evil than situations which might otherwise occur it did not find mergers illegal per se, and it did not exclude mergers from section 15. Thus, while Congress may have sought to forestall the need for mergers it did not intend to leave mergers outside the pale of administrative regulatory surveillance.

The petitioner and Department of Justice urge that section 15 is directed only to that type of agreement which contemplates the continued existence of the parties as separate entities, that jurisdiction to maintain continued surveillance over the agreement is essential. The fact is that continual surveillance exists. The rates and tariffs of the carriers are filed. Their services and practices are made public. In the event that an abuse should later result from the merger the Commission is not powerless to act. It can find rates unjustified pursuant to section 18 of the Shipping Act, 46 U.S.C. 817.^{5/} Any concern that may arise because of a merger is dispelled

^{4/} The Ocean Freight Industry; Report of the Antitrust Subcommittee, House Report No. 1419, 87th Cong., 2d Sess., p. 47.

^{5/} This section provides in part:

"Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carriers is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice."

by the availability of the continued surveillance.

If the plain words of the statute are ignored and merger agreements are not construed as that type of agreement which falls within section 15 of the Shipping Act, 1916, the situation could conceivably arrive wherein parties who have an agreement properly rejected or disapproved by the Commission pursuant to standards applicable to section 15 would have available a major loophole to accomplish their ultimate goal. Rather than enter into a cost sharing or profit sharing agreement which the Commission would disapprove the parties could simply merge. This merger may or may not subsequently be held to be unlawful under the standards of the Sherman Act and Clayton Act. But clearly, the jurisdiction and expertise of the Commission will have been denied. It is inconceivable that Congress would desire application of agency expertise to a given industry and then provide such a major loophole for the parties regulated. A merger between two small companies could be extremely damaging to a given trade route or a certain segment of the shipping public. Yet, by the standards applicable under the antitrust laws the Department of Justice may feel that seeking to set aside the merger would be inappropriate. It is obvious that transportation benefits and the policies set forth by Congress in enacting the Shipping Act, 1916 would thus be defeated.

II. JURISDICTION OVER FOREIGN MERGERS IS NOT GERMANE TO THE ISSUE BEFORE THIS COURT.

Petitioner argues that jurisdiction over approval or disapproval of mergers should be denied because section 15 makes no distinction between

flag or nationality among carriers subject to its requirement. The petitioner expresses concern that the Commission might exercise regulatory jurisdiction permissively in view of foreign flag mergers over which the Commission might not exercise jurisdiction. This argument does violence to the language of section 15 and to the long established concern of the Commission for equality of treatment under the Shipping Act regardless of flag.

Section 17, for example, relating to regulation of terminal practices makes no distinction between domestic terminals and foreign terminals. Although the Commission does not exercise regulatory supervision over practices of foreign terminals it has yet to be accused of being permissive in its regulation of domestic terminals. The Commission has been concerned as previously stated that it afford equal treatment to all carriers regardless of flag. However, subjecting an agreement to merge between American flag carriers to administrative scrutiny and regulation under section 15 is not affording unequal treatment to foreign flag carriers. There has been no showing that this would impose an undue burden on domestic carriers. To assert the foregoing as a reason for denying jurisdiction is indeed stretching for an argument.

IV. THE COMMISSION APPLIED PROPER STANDARDS IN GRANTING APPROVAL OF THE MERGER AGREEMENT AND ITS ADMINISTRATIVE EXPERTISE SHOULD NOT BE DISPLACED.

The Commission noted that no exceptions were taken to the findings of fact upon which the examiner based his conclusion to approve the agreement to merge. The examiner found that the merger would have a pro-competitive,

rather than anti-competitive, effect. The examiner found that the record did not demonstrate any probability that the proposed merger would stifle or substantially attenuate the competition of States Steamship Company, nor did the examiner find any probability whatever that the proposed merger would have any injurious impact upon plans of Matson Navigation Company, as presented to the examiner.

The petitioner has presumed that mergers are illegal per se. That is simply not so. The petitioner also presumes that all mergers are destructive of competition. Again, that is simply not so. There were facts presented in this matter which tended to show that the merger might be pro-competitive in effect. The examiner made a deep and extensive analysis of the market, elasticity of demand, the consumer and competition, as well as an analysis of the "public interest."

The Commission was not unaware of antitrust principles. The Commission and examiner were aware of the nature of the industry involved. See Brown Shoe Co. v. United States, 370 U.S. 294 (1962). The Commission accordingly found that the significance of the merging companies' share of the market was diminished considerably by the nature of the industry involved and by the fact of continued surveillance and regulation. The Commission also considered the fact that it has long been recognized that there is ease of entry into the steamship trade competition. ^{6/} Notwithstanding the extensive analysis of the proposed merger in light of the standards of antitrust laws,

^{6/} Index to the Legislative History of the Steamship Conference Dual Rate Law. S.Doc. No. 100, 87th Cong., 2d Sess. 1961.

the Commission though it did so, was not compelled to adhere to antitrust law standards. That strict adherence to antitrust law standards is not required in transportation industry mergers was established by the decision of the Supreme Court in Florida East Coast Ry. Co. v. United States, 386 U.S. 544 (1967). See also McLean Trucking Co. v. United States, 321 U.S. 67 (1944).

The conclusions of the Commission were derived from extensive evidence and upon findings of fact to which no exceptions were taken. The Commission's expertise was employed in an extremely complex analysis and its conclusions based thereon must not be supplemented. The substantial evidence considered by the Commission supports its conclusion that the merger agreement should be approved. The Supreme Court has spelled out the premium placed upon agency expertise many times. This was done specifically with respect to the Federal Maritime Commission in the case of Consolo v. Federal Maritime Commission, 386 U.S. 607, 619-621 (1966), as follows:

"Section 10(e) of the Administrative Procedure Act (60 Stat. 243, 5 U.S.C. §1009(e) (1964 ed.)) gives a reviewing court authority to 'set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, [or] an abuse of discretion . . . [or] (5) unsupported by substantial evidence. . . .' Cf. United States v. Interstate Commerce Comm'n, 91 U.S.App.D.C. 178, 183-184, 198 F.2d 958, 963-964, cert. denied, 344 U.S. 893. We have defined 'substantial evidence' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 229. '[i]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' Labor Board v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300. This is something less than the weight of the evidence, and the

possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Labor Board v. Nevada Consolidated Copper Corp., 316 U.S. 105, 106; Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18, 21.

"Congress was very deliberate in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute. These policies are particularly important when a court is asked to review an agency's fashioning of discretionary relief. In this area agency determinations frequently rest upon a complex and hard-to-review mix of considerations. By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency." See also Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Commission, 314 F.2d 928 (9th Cir. 1963) and Stockton Port District v. Federal Maritime Commission, 369 F.2d 380 (9th Cir. 1966), cert. denied, 386 U.S. 1031 (1967).

CONCLUSION

Denial of application of section 15 to merger agreements could result in a substantial anti-competitive activity completely escaping administrative regulatory scrutiny. While the merger here under review was found to be potentially pro-competitive rather than anti-competitive, situations could arise in which the lack of regulatory scrutiny could result in substantial injury to competition, competitors, and the shippers. Any regulatory review outside of the scope of section 15 of the Shipping Act would be in the absence of the agency expertise upon which Congress has placed a premium.

Accordingly, the Commission's conclusion has a reasonable basis in law. Its elaborate and complete decision is supported by substantial evidence and its conclusions have warrant in the record. Accordingly, the order of the Commission should be affirmed.

Respectfully submitted,

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Washington, D.C.
May 20, 1968

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATSON NAVIGATION COMPANY,

Petitioner,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA,

Respondents.

UPON PETITION FOR REVIEW OF AN
ORDER OF THE FEDERAL MARITIME COMMISSION

BRIEF ON BEHALF OF THE UNITED STATES OF AMERICA

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22604

MATSON NAVIGATION COMPANY,

Petitioner,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA,

Respondents.

UPON PETITION FOR REVIEW OF AN
ORDER OF THE FEDERAL MARITIME COMMISSION

BRIEF ON BEHALF OF THE UNITED STATES OF AMERICA

The United States believes that the Federal Maritime Commission is in error as to one issue on review before this Court and takes no position as to the other. It is therefore filing its brief at approximately the same time as the petitioner, even though the United States is a party-respondent pursuant to 28 U.S.C. 2344.

STATEMENT

This case is before the Court on a petition filed by the Matson Navigation Company to review a final order of the Commission issued under the Shipping Act, 1916 (the Act), (46 U.S.C. §§ 801, et seq.). Jurisdiction of the Court rests on 28 U.S.C. 2342.

The order was entered upon the conclusion of an administrative proceeding instituted by the Commission for the purpose of investigating an agreement for consolidation or merger among three common carriers by water - American Mail Line, Ltd., American President Lines, Ltd., and Pacific Far East Lines, Inc. All are intervenors in this Court.

The Commission, dividing 3 to 2, held that the agreement is the kind of agreement which is included within the Commission's jurisdiction under Section 15 of the Act (46 U.S.C. 814) and approved the agreement. If the agreement is within the scope of Section 15, the Commission's approval exempts it from the antitrust laws. See Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213; Volkswagenwerk v. Federal Maritime Commission, ____ U.S. ____, No. 69, decided March 6, 1968.

It is the view of the United States that the Commission erred in holding that merger agreements are subject to its jurisdiction pursuant to Section 15 and that it may therefore immunize such agreements from the antitrust laws. This brief will be limited to a statement of the position of the United States on that issue. The United States takes no position, however, on the issue of whether, if the Commission does have jurisdiction, the Commission's decision to approve the agreement was proper. 1/

1/ The Department of Justice intervened in the administrative proceeding also for the limited purpose of presenting its views on the issue of the Commission's jurisdiction to immunize merger agreements from the antitrust laws.

SUMMARY OF ARGUMENT

Because the antitrust laws reflect fundamental national economic policy, exceptions to those laws are narrowly construed and implied repeals are strongly disfavored. Accordingly, Congressional intent to immunize a class of transactions otherwise subject to those laws as, for example, corporate mergers, must be shown in unmistakable terms.

There is nothing in Section 15 which makes any reference to mergers. The language indicates rather an intention to deal only with cooperative working agreements.

Nor is there anything in the legislative history which indicates that mergers are to be included. On the contrary, it indicates an intention to permit joint rate-making and other cooperative agreements under government supervision as the lesser evil than the situation which would otherwise occur and which Congress believed could not be prevented: the lines would engage in rate wars and this in turn would result in the permanent loss of competition to the industry through failure or consolidation.

Other available guides of Congressional intent confirm that Congress did not mean to include mergers in Section 15. Where Congress intended to authorize other regulatory agencies (the I.C.C., C.A.B. and F.C.C.) to pass upon mergers, it did so in clear and specific language. The Interstate Commerce Act, for example, makes it lawful with approval of the Interstate Commerce Commission "to consolidate or merge" (49 U.S.C. 5(2)) and relieves "from the operation of the antitrust laws" the transaction so approved (49 U.S.C. 5(11)). The absence of an express grant to the Federal Maritime Commission strongly suggests the absence of such intention. Moreover, the silence of the Shipping Act, following so closely upon enactment of the Panama Canal Act of 1912 and the Clayton Act in 1914, both of which were directed in unmistakable terms at intercorporate combinations involving ownership, furnishes additional evidence of an intention not to include mergers in the Shipping Act.

ARGUMENT

Introduction

It is now settled that the Shipping Act does not grant the shipping industry a complete immunity from the antitrust laws. Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 219-220. What was given was a "limited antitrust exemption," id. at 219; Federal Maritime Commission v. Svenska Amerika, ____ U.S. ____, Nos. 257 and 258, decided March 6, 1968. The basic issue presented by this case relates to the range of agreements which the Commission is authorized under Section 15 to approve and thereby to exempt from the antitrust laws.

There is no question that Section 15 empowers the Commission to immunize agreements providing for cooperative working arrangements among shipping lines. Volkswagenwerk v. Federal Maritime Commission, supra. The question here is whether this power extends to an agreement providing for a merger of such lines.

The differences between the two types of agreements are by no means inconsequential. Cooperative working

arrangements, which include conference agreements, pooling agreements, transshipment agreements, and joint service agreements (See Marx, International Shipping Cartels (1953), Ch. VIII), are negotiated between separate and independent lines. They are terminable, susceptible of modification in the event of changed conditions, and do not eliminate all competition between the parties. In the case of shipping conferences, for example, in which competing lines agree for the purpose of fixing rates and otherwise restricting competition, there may remain vigorous competition among the member lines. Marx, id., at pp. 3, 137, 250-251; Gorter, United States Shipping Policies (1956), p. 146.

It is important to remember that shipping conferences are not combines linked by shareholdings or any other form of common ownership.* * * 'A shipping conference is a meeting in which competitors face one another with the object of achieving that minimum of co-operation which will suffice to prevent such chaotic competition as might render impractical the liner system of working ships. Each member of a conference is seeking the minimum surrender of his competitive freedom which is compatible with this object; his attitude in debate is determined by the sources of strength which lie behind his diplomacy.' [Citation omitted, Marx, id., at pp. 250-251.]

Merger agreements, on the other hand, result in the complete disappearance of one or more of the shipping lines as separate and independent entities and thus eliminate competition between the parties in all respects and on a permanent basis. Furthermore, the safeguard of modifying or disapproving cooperative working agreements, should changing conditions call for such a course, is wholly inappropriate in the case of a merger, for "where businesses have been merged or purchased and closed out it is commonly impossible to turn back the clock." United States v. Crescent Amusement Co., 323 U.S. 173, 186.

In short, mergers permanently change the competitive structure of the industry by eliminating competitors; approved cooperative working arrangements, on the other hand, leave the competitive structure intact, so that competitive conduct remains the rule except in the narrow area defined by the agreement.^{2/} And the agreement must

^{2/} Structure refers to conditions in an industry which are relatively permanent or which change only slowly and which affect the way a firm in that industry operates--e.g., the number and size distribution of firms in the



be no more restrictive than necessary to serve the public interest, after balancing the competitive disadvantages against the asserted justifications.

Federal Maritime Commission v. Svenska Amerika, supra.

The Commission, relying on the language of Section 15, and believing "that the same considerations which led Congress to grant this Commission the power to exempt anticompetitive rate-fixing and pooling agreements from the strictures of the antitrust laws, would apply to a grant of the same power over agreements among domestic carriers to merge" (RD 36, p. 8),^{3/} held that Section 15 extends to merger agreements as well as cooperative working arrangements.

market. Conduct or behavior, on the other hand, refer to the firm's acts and are usually alterable in relatively short periods of time--e.g., rate-making, pooling arrangements. See Kaysen and Turner, Antitrust Policy (1959), pp. 59-60; Areeda, Antitrust Analysis (1967), pp. 70-71.

^{3/} The only record reference in this brief will be to the Report of the Commission, dated October 3, 1967. This Report is listed as item 36 on the list of documents certified to the Court by the Assistant Secretary of the Commission and will be referred to herein as "RD 36".

Apparently it concluded that there is a presumption in favor of including mergers within its power to grant exemptions from the antitrust laws. For it held that neither the language nor the legislative history of Section 15 show that Congress intended to exclude mergers from the scope of the section (RD 36, p. 12).^{4/} We submit that this stands the presumption against implied exceptions to the antitrust laws on its head.

^{4/} The Commission said: "[N]either the language of section 15 nor its legislative history show that Congress did not intend section 15 to cover agreements to merge." Ibid.

THE SHIPPING ACT DOES NOT AUTHORIZE THE
COMMISSION TO APPROVE MERGERS AND THEREBY
IMMUNIZE THEM FROM THE ANTITRUST LAWS

A. The Strong Presumption Against Implied Repeals
of The Antitrust Laws Requires a Showing of
an Unmistakable intention to Include Mergers

The Supreme Court has "long recognized that the antitrust laws represent a fundamental national economic policy * * *." Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218; United States v. Philadelphia National Bank, 374 U.S. 321, 372. It has therefore emphasized that where Congress has carved out an exemption from the antitrust laws it will construe the exemption "strictly". United States v. McKesson & Robbins, 351 U.S. 305, 316; see Esso Standard Oil Co. v. Secatore's Inc., 246 F. 2d 17, 21 (C.A. 1). It will "not assume that Congress, having granted only a limited exemption from the antitrust laws, nonetheless granted an overall inclusive one." California v. Federal Power Commission, 369 U.S. 482, 485. For the same reason, it will not "lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry."

Carnation Co., supra, 383 U.S. at 318. "Repeals of the antitrust laws from a regulatory statute are strongly disfavored and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." (Citations omitted.) Philadelphia National Bank, supra, 374 U.S. at 350-351.

Indeed, Carnation, supra, a Shipping Act case, is typical of the deep-seated reluctance to find repeals of the antitrust laws by implication. In that case, the implementation of rate-making agreements which had not been approved by the Maritime Commission, was found to have offended the Shipping Act as well as the anti-trust laws. The Court refused to hold that the Shipping Act freed the shipping industry from the antitrust laws, notwithstanding the comprehensive pattern of regulation which that Act imposed upon the shipping industry and even though the conduct which offended the antitrust laws was remediable under the Shipping Act by a cease and desist order, by civil penalties of up to \$1,000 a day for each day the violation continued (§15, 46 U.S.C. 814) and an award of reparations to the person injured by the violation (§22, 46 U.S.C. 821).

So, too, in the case of the banking industry.

Philadelphia National Bank, 374 U.S. 321. Not only are banking operations subject to stringent and manifold governmental controls (id., at 327-330) but mergers, consolidations and acquisitions in particular are expressly authorized upon approval of the appropriate governmental agency. Furthermore, the agency is specifically directed to take into account the effect of the transaction on competition and to withhold its approval unless the transaction is found to be in the public interest (id., at 332-333). So profound is the attachment to competition as "our fundamental national economic policy" (id., at 372) that, without an express statutory provision clothing a merger with immunity, not even the agency's approval in an industry so pervasively regulated as banking was held to exempt the merger from Section 7 of the Clayton Act (15 U.S.C. 18).^{5/}

The teaching of these cases is that the immunization of mergers from the antitrust laws must be found,

^{5/} See also the cases collected in Philadelphia National Bank, supra, 374 U.S. at 350, n. 28.

not in the silence of Congress, but in a statutory directive in plain and unmistakable terms. The same considerations that have led the Supreme Court in cases such as Philadelphia National Bank to refuse to imply an immunity as a result of the grant of some regulatory jurisdiction would be equally applicable in a situation such as that present here, i.e., where immunity would follow if jurisdiction had been granted. An ambiguity as to the scope of jurisdiction, all other things being equal, should be resolved against a grant of jurisdiction that accords the agency the exceptional power to immunize. Of course, if jurisdiction over merger transactions is necessarily implied or required by the regulatory scheme, the fact that immunization would follow from an exercise of such jurisdiction does not of itself require a narrow reading of the regulatory scheme. But, as we shall show, there is no such necessary implication. In fact, the evidence clearly points to a concern with transactions which fall short of mergers and which Congress believed would forestall the need for mergers.

B. The Statutory Language, Read in Context,
Shows No Intention to Include Mergers.

Unlike the Interstate Commerce Commission, the Civil Aeronautics Board and the Federal Communications Commission (49 U.S.C. 5(2), 1378; 47 U.S.C. 221, 222), the Federal Maritime Commission has no express authority to approve mergers. The first paragraph of Section 15 of the Shipping Act confers jurisdiction upon the Commission over every agreement among persons subject to the Act:

"fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive preferential, or cooperative working arrangement . . ."

The Commission recognized that this provision grants no express authority to approve mergers. However, fastening upon the language with respect to an agreement

"controlling, regulating, preventing, or destroying competition," the Commission held that an agreement for

merger is included. Viewed in context this is an impermissible reading. The type of agreement to which Section 15 is directed is a "cooperative working" agreement, not one which results in the immediate disappearance of one or more of the parties, but one which contemplates the continued existence of the parties as separate entities.

All the other clauses in the first paragraph of Section 15 refer to agreements providing for working arrangements between the parties. The first five, excluding the one on which the Commission relies, specify agreements which provide for the particular manner by which the parties will work together (e.g., fixing rates, giving special rates, allotting ports, etc.). The concluding clause is a catch-all description embracing agreements "in any manner providing for an exclusive, preferential or cooperative working arrangement." This concluding clause was obviously intended to characterize and define the agreements previously described, including agreements "controlling, regulating, preventing, or destroying competition." See, Virginia v. Tennessee,

148 U.S. 503, 519; Sutherland, Statutory Construction, 3rd Ed., § 4908. Since an agreement for merger is not an "exclusive, preferential or cooperative working arrangement," it is not included within Section 15. 5a/

Support for this reading is also provided by the two immediately following paragraphs of the original Section 15. The second paragraph authorizes the Commission to disapprove any agreement "whether or not previously approved" which it finds fails to meet the statutory criteria (App., infra, p.32) The third paragraph declares existing agreements to be lawful "until disapproved by" the Commission (Ibid.). Both paragraphs thus contemplate the type of agreements which will be susceptible of continuing supervision by the Commission so that the Commission may insure that agreements once approved as not detrimental to commerce, do not

5a/ A contemporaneous comment on the newly enacted Shipping Act describes Section 15 as covering "pooling, rate and other cooperative agreements * * * ." Current Legislation, Government Regulation of Private Shipping, 17 Col. L.R. 357, 358.

become so by virtue of changing conditions or otherwise. Mergers, with their attendant problems of divestiture, do not lend themselves to this kind of treatment.

Volkswagenwerk v. Federal Maritime Commission,
____ U.S. ____, No. 69, decided March 6, 1968, also involved a question as to the scope of Section 15 of the Shipping Act. In that case, an association of persons subject to the Act had entered into an agreement for allocating among themselves a common expense. The agreement there, however, unlike the one here, was concededly a "cooperative working agreement" (slip op., p. 9). The Supreme Court, sustaining the position of the United States (slip op., p. 6), held that it was the kind of cooperative working agreement which was within the Commission's jurisdiction under Section 15 (slip op., pp. 9-16)

5b/ We note that the United States in that case expressed doubt that merger agreements are subject to the Commission's jurisdiction under Section 15 (Brief, p. 24).

C. The Legislative History Makes Clear That The Congress Did Not Intend to Include Mergers

The Shipping Act was passed following an exhaustive investigation of the shipping industry undertaken by the House Committee on Merchant Marine and Fisheries under the Chairmanship of Congressman Alexander. See Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 487-490; Volkswagen, supra, slip op., pp. 13-14. After extensive hearings, the Committee issued a lengthy report, known as the Alexander Report. 6/ The Report includes a questionnaire sent to the steamship lines in the American foreign trade which inquires into preferential or cooperative agreements and understandings with other lines or railroads (Report, pp. 13-14). The Report also describes in detail 80 steamship agreements and conference arrangements in the foreign trade (Id., pp. 21-280). What is striking about the agreements enumerated in the questionnaire and

6/ House Committee on Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade, H. Doc. No. 805, 63rd Cong., 2d Sess.

the 80 agreements analyzed in the Report is that none refers to mergers or consolidations. All concern co-operative working arrangements: agreements to divide traffic or routes, to meet competition of other lines, to fix rates, to regulate sailings, etc. The focus of the Committee's concern, therefore, were the working arrangements among the lines in the American foreign trade--the virtues and vices of these relationships.

The Committee recommended against outlawing cooperative arrangements because it believed that their advantages outweighed their disadvantages. Otherwise rate wars would occur and result in the elimination of the weaker lines through failure or consolidations. The end result "would mean a monopoly fully as effective, and * * * more so, than can exist by virtue of an agreement." (Id., 416). This result could not be prevented by legislation, the Committee reported, but it could be forestalled by the lesser evil of "permitting the several lines * * * to cooperate through some form of rate and pooling arrangement under Government supervision and control." (Ibid.) Thus,

one reason for permitting cooperative agreements, in the committee's view, was that it was necessary to do so in order to forestall consolidations. It said (id., 416):

These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control * * *. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States.

Thus, one of the major purposes of the Committee's report was to permit the minimum of anti-competitive behavior necessary to preserve a competitive structure in the industry by preventing the disappearance of independent firms. The Committee clearly did not intend to permit the legalization of mergers. It did intend to permit the legalization of cooperative arrangements, despite their

shortcomings, and one reason for doing so was that otherwise rate wars would result in the greater evil of eliminating many lines from the industry through failure or consolidation. 7/

In the light of this legislative history, it is apparent that the Commission was mistaken in its view that the considerations which led Congress to permit the legalization of working agreements apply equally to mergers and consolidations. As noted above, an important reason for doing so was that otherwise consolidations would unavoidably accelerate in pace and size, thus eliminating most lines from the industry. A second consideration was that secrecy was characteristic of cooperative arrangements (Alexander Report, pp. 293-295), and this was regarded as a serious disadvantage to shippers (Id., p. 307), a disadvantage which could be eliminated by requiring them to be filed with the government (Id., 311-313, 416). This consideration would obviously not apply to mergers because

7/ The recommendations of the Alexander Committee were adopted by the House and Senate Reports on the Shipping Act. See Volkswagenwerk, supra, slip op., p. 14, n. 25.

they cannot be kept secret. Third, unlike mergers, cooperative agreements are not permanent arrangements which eliminate all competition among the parties. While cooperative agreements may eliminate competition in rates and in certain other areas, there remain substantial areas of non-price competition, e.g. service and the processing of shippers' claims. 8/ Finally, cooperative agreements

8/ One textwriter has described intraconference competition as follows (Gorter, United States Shipping Policy, 1956, p. 146):

If we assume, heriocrally, that the members of a conference adhere strictly to their agreement, then they must compete with each other on a so-called nonprice basis. Better service would appear to be the principal inducement to offer to shippers in an effort to obtain their patronage. This means offering faster, more convenient schedules, and special facilities for cargo handling--e.g., refrigerated space. However, even speed may be ruled out as a competitive factor. In some conferences, rates have been geared to speed--the slower the vessel the lower the rates. Actually competition often goes beyond these theoretical confines. Violations of agreements occur and competition intrudes on rates. The abuses will persist so long as they are not flagrant or discovered by disadvantaged "clean" competitors. Such "shadings" of the rules are difficult to

are continuously subject to modification or disapproval;
as noted (supra, p. 8), this safeguard cannot be applied
in the case of mergers.

eliminate in an arrangement based upon
self-interest but calling for self-discipline.
Competition among conference members is often
intense, depending upon conditions in the trade.
[Footnote omitted.]

See also Marx, International Shipping Conferences (1953),
pp. 250-251.

D. Other Manifestations of Congressional Intent Confirm That Congress Had No Intention of Including Mergers in Section 15.

Unlike the Shipping Act, at least three other statutes conferring authority to approve and immunize mergers grant this authority expressly and in unmistakable terms. The Interstate Commerce Act makes it lawful, with the approval of the Commission, "to consolidate or merge * * * [or] to acquire control * * *" (§5(2), 49 U.S.C. 5(2)) and relieves "from the operation of the antitrust laws" the transaction so approved (§5(11), 49 U.S.C. 5(11)). Similarly, the Federal Aviation Act makes it unlawful without approval of the Civil Aeronautics Board "to consolidate or merge * * * [or] to acquire control * * *" (§408, 49 U.S.C. 1378) and grants antitrust exemption for an approved transaction (§414, 49 U.S.C. 1384). The Federal Communications Act also speaks directly and in unmistakable language regarding consolidations, acquisitions and mergers and grants immunity for those approved by the Federal Communications Commission (§§ 221, 222, 47 U.S.C. 221, 222).

The Maritime Commission believed that the explicit grant of authority in the case of the other regulatory agencies warrants no inference against a grant of authority to it, despite the absence of language in the Shipping Act dealing expressly with mergers. It reasoned that the Shipping Act was passed first and "granted the broadest possible authority over anticompetitive agreements * * *." (RD 36, p. 10). Accordingly, the "subsequent specificity could well reflect nothing more than a later stylistic preference in legislative draftmanship." (Ibid.)

With deference, we submit the Commission's refusal to give any weight to the later enactments is not warranted. In the first place, the Commission begs the question. Of course, Congress granted authority over anticompetitive agreements. The issue is whether the authority which Congress granted extended to agreements for merger and consolidation as well as to cooperative working agreements. In the second place, it may well be, as the Commission states, that the specificity in the other regulatory

statutes reflects a "stylistic preference." One would expect, however, that if this were the case, the legislative histories of the other enactments would indicate an intention to depart from the style assumed to have been preferred in the Shipping Act. Yet, none has been suggested. We submit that the explicit and direct treatment of mergers in the case of the other statutes is not a neutral fact, but is further evidence of a lack of intention to include mergers in the Shipping Act.

What is more, there are also statutes enacted prior to the passage of the Shipping Act which speak in distinct and unmistakable language to the problem of combinations involving ownership. Section 11 of the Panama Canal Act of 1912 (37 Stat. 560, 566, 49 U.S.C. 5(14)), which amended Section 5 of the Interstate Commerce Act, dealt with ownership or control of water carriers specifically. The amendment made it unlawful for any railroad "to own * * * control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier

by water operated through the Panama Canal or elsewhere" with which the railroad may compete. Section 7 of the Clayton Act, as originally enacted (38 Stat. 731), was plainly directed at control of corporate unifications. This, too, was enacted prior to the passage of the Shipping Act. The silence of the Shipping Act on mergers, following so closely upon these enactments, furnishes eloquent evidence that Congress had no intention to include mergers under the Shipping Act.

The relevance of the prior enactment of the Panama Canal Act is heightened by the fact that the Alexander Committee, which recommended passage of the Shipping Act, was fully aware of it. Indeed, the Committee in making its recommendations to Congress with respect to water carriers in the domestic trade, referred at length to the Panama Canal Act and specifically to Section 11, described above, which it said "go far toward eliminating some of the undesirable practices which were found by the Committee to exist in the domestic commerce of the United States." (Alexander Report, p. 422.)

CONCLUSION

Section 15 of the Shipping Act does not empower the Maritime Commission to approve mergers and thereby to immunize them from the antitrust laws. Neither the language nor the legislative history show an intention to include agreements to merge or consolidate. On the contrary, the legislative history shows that Congress' concern was with cooperative agreements only and that it permitted such agreements, albeit under supervision, on the premise that it was necessary to do so in order to prevent the worse evil of destructive rate wars resulting in failures and corporate consolidations and the attendant permanent loss of competition in the shipping industry. This reading of Section 15 is confirmed by other evidence of Congressional intention and is further reinforced by the strong presumption against implied repeals of the antitrust laws.

The order of the Commission, insofar as it rests on the theory that the jurisdiction of the Commission

extends to mergers, should be set aside.

Respectfully submitted,


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APRIL 1968.

CERTIFICATE OF COMPLIANCE WITH
RULES 18 AND 19 OF THIS COURT

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in cursive script, reading "Irwin A. Seibel", is written over a horizontal line.

IRWIN A. SEIBEL

Attorney, Department of Justice

APPENDIX

Section 15 of the Shipping Act, 1916, as originally enacted (39 Stat. 733-734), provides as follows:

SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to

be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of \$1,000 for each day such violation continues, to be recovered by the United States in a civil action.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the within Brief on behalf of the United States by mailing (first class regular mail) three copies thereof to counsel for the Federal Maritime Commission and to counsel for the Intervenor, both located in Washington, D.C., and by mailing (first class air mail) three copies thereof to counsel for petitioner, located in San Francisco.

Dated at Washington, D.C., this 15 day of April, 1968.

A handwritten signature in cursive script, reading "Irwin A. Seibel", is written over a horizontal line.

Irwin A. Seibel

No. 22604 JUN 24 1968

In the
United States Court of Appeals
for the Ninth Circuit

MATSON NAVIGATION COMPANY,

Petitioner,

vs.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

Reply Brief of Petitioner
Matson Navigation Company

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In the

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MATSON NAVIGATION COMPANY,

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Respondents.

Reply Brief of Petitioner
Matson Navigation Company

In addition to the brief filed herein by Petitioner Matson Navigation Company April 15, 1968 (MB), briefs have been filed, respectively, on behalf of Respondents United States of America by the Department of Justice (JB), Respondent Federal Maritime Commission (CB) and Intervening Respondents American Mail Line Ltd., American President Lines, Ltd. and Pacific Far East Line, Inc. (RB).¹

Matson's position and its reasons for believing the Commission does not have merger jurisdiction and that its approval of the merger was erroneous, in any event, are fully stated in our earlier brief. We shall here first respond to respondents' contention

1. The four briefs filed will at times be abbreviated as indicated in parenthesis above. We shall refer to the intervening respondents as "respondents," and the two required respondents, respectively, as "the Commission" and "Justice." Record references and other abbreviations will be in accordance with those employed in Matson's brief of April 15, 1968.

Matson lacks standing and then seek to bring the principal questions into focus in the course of commenting on the relevant arguments advanced by the Commission and respondents.

I. MATSON HAS STANDING TO LITIGATE RESPECTING ALL QUESTIONS PRESENTED BY ITS PETITION IN THIS COURT.

A. Matson is a Party Aggrieved by the Commission's Order.

Neither the Commission nor Justice has joined respondents' contention that Matson lacks standing to seek judicial review of the Commission's order. The contention is without merit. Pursuant to 28 U.S.C. § 2344, any "party aggrieved" has standing to seek judicial review of the Commission's orders under Section 15 of the Shipping Act, 1916. Matson was a party to the proceedings before the Commission² and Matson was "aggrieved" by the Commission's order approving the merger both (1) because Matson will be confronted with a stronger competitor as a result of the merger and (2) because Matson would be barred by the *res judicata* effect of the Commission's order, if permitted to stand, from thereafter challenging the validity of the merger in any anti-trust suit it might find it necessary to bring against respondents.

1. MATSON'S STANDING AS A COMPETITOR.

Matson's petition to review outlines the nature of present and potential competition between Matson and respondents. The petition recites (p. 3) that Matson presently operates cargo vessels between the United States Pacific Coast and the Far East³ and cargo and passenger vessels between the United States Pacific Coast and Hawaii, that respondents presently operate cargo ves-

2. Matson was named a party in the Commission's order of investigation (R.D. 1, p. 2), as the Commission's decision of October 3, 1967 recites (R.D. 36, p. 2). This much is conceded by respondents (RB 12), though they claim the Commission later also, and contradictorily, found Matson lacked sufficient interest to be named a party (see *infra*, pp. 6-7).

3. At the time of the hearing before the Commission, Matson had not yet commenced service in the Far East trade, but it had firm plans to do so in the fall of 1967 (R.Tr. 1704-08). That service was commenced in September, 1967, and is presently in operation, as planned, with two container vessels.

sels between the United States Pacific Coast and the Far East, and that APL operates vessels that carry passengers between the United States Pacific Coast and Hawaii and plans to take up an interest in a corporation that will operate cargo vessels in the California-Hawaii trade.⁴ The Commission's decision finds that as a result of merger respondents "would become in many ways a more formidable competitor" (R.D. 43, p. 15). This strengthened competition will be a reality if the Commission's approval stands unchallenged, and it provides Matson with a sufficient interest to maintain this appeal.

The leading case is *Federal Communications Comm'n v. Sanders Bros. Radio Station*, 309 U.S. 470, 475-77 (1940). The Court there held that increased competition afforded petitioner radio station standing to seek judicial review of the Commission's order granting a radio license to another station. This was so, even though the Commission was not required to give independent consideration to the economic detriment to competitors resulting from grant of a license. The Court did not concern itself with the nature or extent of financial detriment to petitioner. The mere fact that the grant of a license would increase competition gave the petitioner the requisite interest and standing as a party "aggrieved" or "adversely affected" within the meaning of the applicable statute.⁵

The rule of the *Sanders* case has been repeatedly applied by the lower federal courts in according persons standing to litigate the

4. Respondents chide Matson for not having included a conclusionary allegation that it is a "party aggrieved" (RB 14, note 6). It is of course the ultimate facts of Matson's interest, rather than the conclusionary statement, that were correctly alleged in Matson's petition. *Associated Industries, Inc. v. Ickes*, 134 F.2d 694, 712-13 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943).

5. In contrast to *Sanders*, the cases relied on by petitioners involve denial of standing in instances where no direct competition existed. *E.g.* *United States Cane Sugar Refiners Ass'n. v. McNutt*, 138 F.2d 116 (2d Cir. 1943); *Simmons v. FCC*, 145 F.2d 578, 579 (D.C. Cir. 1944); *Simmons v. FCC*, 169 F.2d 670, 672 (D.C. Cir. 1948), *cert. denied* 335 U.S. 846 (1949); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 36-37 (D.C. Cir. 1950); *Pittsburgh Radio Supply v. FCC*, 98 F.2d 303 (D.C. Cir. 1938). Most of these cases have been repeatedly distinguished in more recent decisions.

validity of administrative orders of various kinds granting benefits to persons even remotely competitive.⁶ Such persons have the right to litigate all issues in the case, having standing not only as representatives of their own interests but also as representatives of the public interest.⁷ In more recent years this doctrine has been extended to include persons who have no economic interest.⁸ In determining questions of standing, the courts have been particularly cognizant of preserving the litigating rights of those classes of persons that the statute in question was designed to protect.⁹ Here, there can be no doubt that competing carriers are one of the classes intended to be protected by Section 15.

It is of interest to note that one of the respondents did some pioneering work in the field of the standing of competing carriers to challenge administrative action. In *American President Lines, Ltd. v. FMB*, 112 F. Supp. 346 (D.D.C. 1953), APL successfully overcame the challenge to its standing in an action to set aside the award of subsidy to two of its competitors, one of whom is now an intended merger partner. The court held the *Sanders* case interpretation of the Federal Communications Act to govern the similar language ("adversely affected or aggrieved") in the Administrative Procedure Act (now enacted as 5 U.S.C. § 702). "If a competitor *who fears adverse economic effects*, has a right to challenge the legality of official action under one of the Acts, the

6. *Transcontinental Bus System v. CAB*, 383 F.2d 466, 475-77 (5th Cir. 1967); *National Airlines, Inc. v. CAB*, 306 F.2d 753, 757-58 (D.C. Cir. 1962); *Philco Corp. v. FCC*, 257 F.2d 656 (D.C. Cir. 1958); *Reade v. Ewing*, 205 F.2d 630 (2d Cir. 1953); *National Coal Ass'n v. FPC*, 191 F.2d 462 (D.C. Cir. 1950).

7. *Federal Communications Comm'n v. National Broadcasting Co.*, 319 U.S. 239 (1943); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14-15 (1942); *Associated Industries, Inc. v. Ickes*, 134 F.2d 694 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943).

8. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 615-16 (2d Cir. 1965); *State of Washington Dept. of Game, et al. v. FPC*, 207 F.2d 391, 395 at n. 11 (9th Cir. 1953), *cert. denied* 347 U.S. 936 (1954).

9. *Scenic Hudson Preservation Conference v. FPC*, *supra*; *Reade v. Ewing*, *supra*; *Associated Industries, Inc. v. Ickes*, *supra*; *State of Washington Dept. of Game, et al. v. FPC*, *supra*.

conclusion is inescapable that he may do so under the other Act.” (112 F. Supp. at 349, emphasis ours.)¹⁰ It is perhaps noteworthy that the court thought it sufficient for APL to *fear* adverse economic effects. We suppose that the increased competitive strength that would flow from the award of subsidy to an existing competitor is comparable in principle at least to the increased competitive strength that would result from merger of three existing subsidized competitors.

2. THE RES JUDICATA EFFECT OF THE BOARD'S ORDER.

There is even a more fundamental reason why Matson is legally aggrieved by the Board's order. The Commission has determined in a proceeding to which Matson was a party that it has jurisdiction to immunize the merger of three of Matson's competitors from the antitrust laws. The only means by which Matson could contest the validity of that determination is by appeal of the Commission's order. Matson would be barred by the *res judicata* (or collateral estoppel) effect of the Board's order from collaterally attacking it in a subsequent antitrust suit. *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 402-04 (1940); *Seatrains Lines v. Pennsylvania R. Co.*, 207 F.2d 255, 259 (3rd Cir. 1953); 2 Davis *Administrative Law Treatise*, § 18.07 (1958). Hence, Matson's legal rights are adversely affected by the Commission's order, and for that reason alone it has a sufficient interest to appeal the Commission's decision. *Fishgold v. Sullivan Drydock Corp.*, 328 U.S. 275, 281-84 (1946). See also *Associated Industries, Inc. v. Ickes*, *supra* at 705.¹¹

10. The court's holding that the Administrative Procedure Act conferred a right to judicial review upon the petitioner therein was disapproved in *Kansas Power & Light Co. v. McKay*, 225 F.2d 924, 932 (D.C. Cir. 1955), *certiorari denied*, 350 U.S. 884 (1955). However, the court's holding that petitioner had *standing* to obtain review was not disturbed. 3 Davis, *Administrative Law Treatise* 256 (1958). Here, of course, there is no question that a statutory right of review is afforded by 28 U.S.C. § 2342.

11. Whether *res judicata* would apply to the United States we do not argue. In this connection, see note 13, *infra*.

B. The Commission Did Not Determine That Matson Lacks an Interest.

The Commission determined the question of Matson's standing in its order of investigation, naming Matson as a party to the proceeding (R.D. 1, p. 2), and it does not now challenge the adequacy of Matson's standing to obtain review of its decision. Matson had previously filed a petition in which it alleged its interest as a potential competitor of the merger applicants. The respondents' reply argued that Matson had not alleged a sufficient interest to provide the basis for a hearing because (1) Matson, which was not then a competitor in the Far East trade, had no firm plans for entering the trade and (2) the effect of the merger on APL's entry into the Hawaii trade would be negligible. Matson filed a response, in which it asserted, among other things, that the genuineness of Matson's plans to enter the Far East trade at the very least presented a question of fact that could be determined after hearing.

The Commission's order contained no reservation regarding Matson's status as a party.¹² Respondents' reliance on *Interstate Electric, Inc. v. FPC*, 164 F.2d 485 (9th Cir. 1947) and *Panhandle Eastern Pipe Line Co. v. FPC*, 219 F.2d 729 (3d Cir. 1955), certiorari denied, 349 U.S. 945 (1955), is therefore misplaced. In both of those cases the order granting intervention specifically reserved the question of intervenors interest, and the Commission's final orders were construed as determining that question adversely to petitioner.

Nor did the Commission's decision purport to hold that Matson did not have a genuine interest in the Far East trade or that it lacked standing as a party to the proceeding. The Commission's

12. The Commission's Rules (46 C.F.R. § 502.69) require petitions to "state clearly and concisely petitioners grounds or interest in the subject matter." Had the Commission wished to grant Matson provisional status pending determination of its "interest", it would have expressly done so. Indeed, the Examiner subsequently held that a petition to intervene, which would have required the *Examiner* to determine Matson's "interest" (46 C.F.R. § 502.72), need not be filed by Matson, because it was named a party in the Commission's order (R.D. 8).

decision traced the steps that Matson had then taken to enter the Far East trade and the details of its proposed operation. The Commission noted that Matson's Far East plans "were formally announced while the hearing herein was in progress; it has been proceeding with its planning as fast as it could. . . ." (R.D. 43, p. 28.) These findings were sufficient to establish Matson's "interest" if any had been needed.

It is perfectly clear that the language on which respondents rely was directed to a determination of the ultimate issues of approvability, not of standing. The findings respondents quote, when placed in context, show that the Commission found "there can be no doubt that the merged company would gain considerable flexibility and would become in many ways a more formidable competitor as a result of the integration of the fleets," but the Commission believed such results would not be contrary to the public interest, "unless they may drive less efficient competitors out of business" (R.D. 43, p. 15). Under the standards applied by the Commission, which Matson maintains are erroneous (MB 50-61), it concluded that "the record does not establish any probability whatever that the proposed merger will have any injurious, much less crippling, impact" upon Matson's service (R.D. 43, pp. 28-29), "the record does not establish the probability of any destructive or stifling effect upon competition or any competitor" (R.D. 43, p. 42), and "the benefits of the merger will outweigh any potential injury" (R.D. 43, p. 43).

Respondents seem to attach significance to the fact that Matson did not here take exception to the findings quoted above. Matson did not take exception to them, because it regards them as products of the erroneous criteria that were applied by the Commission under Section 15. We have stated at some length in our opening brief what we think the proper test should be and what showing should have been required from the merger applicants (MB 40-50). As we there point out, the Commission did not even require respondents to come forth with a plan of merger or to explain how their combined fleets would be operated. Under the circumstances, it would have been virtually impossible for Matson to

demonstrate precisely in what respects it would be injured by a plan of operation not divulged, and Matson has never claimed, based on the facts as presently known, that it would be driven "out of business" as a result of the merger (R.D. 43, p. 15). We think these are self-evidently matters that far transcend and have no relation to the question of Matson's interest in the litigation.

In the final analysis, respondents betray something less than full confidence in their contention that Matson lacks standing. For they assert that the Court has jurisdiction because Justice, itself a *respondent* in the case, has seen fit to support Matson's side of the jurisdiction argument. This assertion is obviously specious. The case is either properly here because Matson had standing to bring it here, or it is not here at all. If respondents were correct, the proper remedy would be a motion to dismiss.¹³ What respondents' contention comes down to is a thinly veiled attempt to discourage this Court from considering the Commission's decision on the "merits" (MB Point II, pp. 40 *et seq.*), in the unlikely event it should hold the Commission has merger jurisdiction.

II. THE COMMISSION LACKS MERGER JURISDICTION.

Matson's position on the jurisdictional question in this case can be summarized as follows: Section 15 lists a series of types of agreements to which it is applicable, but nowhere expressly refers to agreements for the acquisition of the stock or assets or the corporate amalgamation of carriers. Thus, if the Commission has

13. The intervention of the Department of Justice in the proceeding below made the United States a "party" before the Federal Maritime Commission. (JB 3, fn. 1; Rule 3(a) of the Commission's Rules of Practice; 46 C.F.R. § 502.41.) Respondents do not question the right of the United States to have petitioned this Court. Their complicated analysis at this point seems to be that Justice did not do so because it could not or did not anticipate the "defects" in Matson's petition, and for this reason the Court should save Justice from its omission and rule the case properly here for review. (RB 18.) For the reasons discussed above, Matson has adequate standing and the Court has no occasion to fabricate what would otherwise be a non-existent jurisdiction. The simple inference would seem to be that Justice, with full knowledge of the case and the Commission's decision, properly concluded that Matson had standing to bring all or any of the issues in the case here for review.

jurisdiction respecting merger *agreements*, it must be by implication included in the phrase “agreements . . . destroying competition.” We have advanced several reasons for concluding that such an attenuated merger jurisdiction should not be implied (MB 12-40).

The position taken by Justice in its brief on the jurisdictional issue is essentially the same, with only minor variations, as that advanced by Matson.

The briefs filed, respectively, by the Commission and respondents argue that merger agreements fall within the literal language of Section 15 and that a strong showing must be made for excluding them. They then undertake to controvert the reasons raised by Matson and Justice for concluding that Section 15 was not intended to extend to mergers. Except for the somewhat novel “loophole” argument advanced by the Commission (*infra*, p. 17), neither respondents nor the Commission have advanced any affirmative arguments in favor of the attenuated merger jurisdiction claimed by the Commission. In our judgment, they have equally failed to neutralize the several compelling reasons advanced by Matson and Justice for concluding that Commission jurisdiction over mergers by agreement should not be implied. We shall now comment briefly upon the principal contentions raised by the Commission and respondents.

A. The Language of Section 15.

Both the Commission and respondents concede that the language of Section 15 does not expressly refer to mergers or contain the kind of language that customarily is employed by Congress in investing regulatory powers over corporate amalgamations.¹⁴ (CB 6; RB 20.) However, they assert that a merger

14. Section 7 of the Clayton Act, as originally enacted, employed the terms “acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation” (38 Stat. 731 (1914)).

Section 11 of The Panama Canal Act of 1912 prohibited any common carrier subject to the Act “to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly,

agreement fits within the literal language of Section 15 because it destroys competition, and respondents chide Matson and Justice for allegedly pushing “in silence past this central point to advance a variety of peripheral theories.” (RB 19.) We thought the statement in our opening brief that “Section 15 does not extend to mergers either expressly or impliedly” (MB 12) was reasonably clear. Whether and to what extent mergers were intended by Congress to be subject to Section 15 is the whole point here at issue. Not even the Commission claims that all mergers or even all merger agreements are subject to Section 15.

Respondents characterize Section 15 as having a “broad sweep” and quote from the Supreme Court’s decision in *Volkswagenwerk v. FMC*, 390 U. S. 261, 273 (1968), to the effect that Section 15 “uses expansive language” (RB 22). Respondents choose to ignore the facts, noted in Matson’s brief, that Section 15 describes a series of specific types of agreements (MB 12-13) and that it is the final phrase, “or in any manner providing for an exclusive, preferential, or cooperative working arrangement” (emphasis ours) that the Supreme Court referred to in *Volkswagenwerk* when it chided the Commission for taking an “extremely narrow” view of an agreement that it held to be a cooperative working arrangement (MB 29, note 30).

In denying that the final phrase of the first paragraph of Section 15 characterizes the preceding phrases (RB 22), respondents

indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete. . . .” (37 Stat. 566-67 (1912)).

The Transportation Act of 1920 vested the Interstate Commerce Commission with jurisdiction to regulate the “acquisition . . . by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system” and to permit “two or more carriers by railroad . . . to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation. . . .” (41 Stat. 481-82 (1920)).

ignore the parallel between Section 15 and Section 412 of the Federal Aviation Act (MB 31, note 33), and erroneously suggest that other types of agreements that are not working arrangements "have always been subject to Section 15" (RB 22). Their examples of a sale of a line or of a ship to a competitor and of an agreement not to compete between two existing steamship companies are clearly inapposite. The Commission has never held that an agreement to sell a ship or line is subject to Section 15, unless a covenant not to compete among continuing entities was also involved.¹⁵ Indeed, respondents concede as much at a later point in their brief when they discuss three pertinent authorities that specifically so held (RB 40). The same cases stand for the proposition that a covenant not to compete among continuing entities is a working arrangement, which, contrary to respondents' assertions (RB 22), it clearly is.

Matson contends that the Commission is to approve only agreements over which it can maintain continuing supervision and that a merger agreement is not such an agreement (MB 13-14). The Commission responds that supervision will be maintained in the form of rate regulation of the continuing entity (CB 13). In support of this, the Commission erroneously quotes (CB 13, fn. 5) the final paragraph of Section 18(a) of the Shipping Act, which relates to interstate commerce. The merged company's operations will be, of course, predominantly in foreign commerce. Regulation of respondents' rates in foreign commerce, to the extent that it effectively exists (*e.g.*, Sections 17 and 18(b)(5) of the Shipping Act; MB 56, note 59), might provide minimal protection to the shipping public, but it would hardly be continuing

15. For example, when Matson entered into an agreement for the acquisition of the stock of the Los Angeles Steamship Company, it was advised by the United States Shipping Board that "the subject matter of said agreement is not within the purview of Section 15 of the Shipping Act, 1916" (R.Ex. 169). Similarly, when Matson acquired all of the assets of Oceanic Steamship Company, the Board advised Matson that the agreement was not subject to Section 15 (R.Exs. 165, 167, 168).

supervision of the merger agreement and would afford scant comfort to respondents' competitors.

B. The Purpose of Section 15.

In our opening brief (MB 14-24) we emphasize that the regulatory scheme adopted by Section 15 was intended to regulate working arrangements between carriers serving the foreign commerce of the United States, foreign-owned as well as United States-owned, to discourage a tendency toward merger or destructive competition. Congress determined that it would not be practicable to undertake the direct regulation of the ownership, control and amalgamation of such companies, inasmuch as most of the companies serving the United States foreign commerce were foreign-owned.

Respondents refer at some length to the portion of the Alexander Report that dealt with water carriers engaged in domestic commerce, all of whom would be necessarily owned by citizens of this country, and correctly point out that consideration was given to the patterns of ownership among these carriers (RB 30-32). As we previously emphasized (MB 18), this portion of the Alexander Report was contained in a completely different section from the portions which gave rise to Section 15, and the Committee concluded that the Panama Canal Act of 1912, which specifically dealt with the problem of ownership of water carriers by railroads, would "go far toward eliminating some of the undesirable practices." No recommendations were therefore made for the regulation under the Shipping Act of mergers among companies engaged in domestic commerce. Having discussed the problems of stock ownership and control of such carriers in express terms, the Committee surely would not have concealed its recommendations regarding such matters in an obscure paragraph that contained no express reference to them, as respondents suggest (RB 31). Inasmuch as Congress had repeatedly determined that the most prevalent means of effecting monopoly power through corporate control was by stock ownership, it would have been

inexplicable for Congress to omit merger by stock ownership but include merger by agreement.¹⁶

Respondents and the Commission have misconstrued the significance we attach to the problems inherent in granting merger jurisdiction over foreign-owned companies. We do not contend that the Commission's failure to "assume jurisdiction over the 1964 Japanese mergers" is a "recognition that § 15 does not reach to domestic mergers" (RB 25). Rather, we contend that Congress wished to adopt a form of regulation for the international shipping industry that would be applicable alike to foreign-owned and United States-owned companies. Control of foreign mergers was excluded within the limits and for the very reasons suggested in respondents' brief (pp. 26-27). Hence, control of domestic mergers was also excluded in the interests of uniform regulation. Of course, the danger is not that Commission regulation of mergers by United States-owned companies would "impose an undue burden on domestic carriers" (CB 15). Rather, it is that the Commission would be compelled to adopt a permissive attitude toward mergers of United States-owned companies in order to *avoid* imposing an undue burden on such companies. This attitude would in turn encourage a tendency among foreign-owned companies to merge. Thus, the Commission would be placed in the untenable position of encouraging the merger of steamship companies, which is the antithesis of the policy of the Shipping Act. Only by exercising no merger jurisdiction could the Commission properly serve the purposes of the Shipping Act.¹⁷

16. The same Congress that investigated the shipping industry and produced the Alexander Report had also enacted the Clayton Act. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966). Congress had determined that Section 7 of the Clayton Act could adequately deal with domestic mergers by prohibiting consolidation of corporate control through stock acquisition, because that was the form of merger then most prevalent. *United States v. Philadelphia National Bank*, 374 U.S. 321, 338 (1963).

17. It would then be for the Justice Department to wrestle with the problem of enforcing Section 7 of the Clayton Act within industries, such as the steamship industry, in which competition from foreign-owned companies may be a significant factor. For whatever it is worth, we do not

C. Section 7 of the Clayton Act and Advices to Congress.

The 1950 Amendment to Section 7 of the Clayton Act provides that Section 7 shall not apply to transactions authorized by the Commission, among other agencies, "under any statutory provision vesting such power", and our opening brief cites two Supreme Court cases holding that this provision was not a recognition by Congress that any particular agency there listed in fact had the power to approve mergers with the effect of immunizing them from Section 7 (MB 22-23). Respondents characterize Matson's position as "surprising" (RB 38). The Commission's brief asserts that Section 15 agreements "could not be subject to Section 7 unless they were merger agreements" and that Congress "was aware that the Commission claimed such jurisdiction under Section 15" (RB 11).

Inasmuch as Section 7 of the Clayton Act applies to acquisitions of "the whole or any part" of the stock or assets of a corporation, it does not seem fair to say that Section 7 is limited to "merger agreements". It is not difficult to imagine various kinds of working arrangements among carriers that would be clearly subject to Section 15 and also within the purview of Section 7. These could include such arrangements as the acquisition of "good will" by one carrier from another for a term of years with a covenant not to compete attached, which was held to be subject to Section 15 in *New York and Porto Rico Steamship Co.—Waterman Steamship Corp. agreement*, 2 U.S.M.C. 453 (1940), or the formation and operation of a joint venture corporation by two entities subject to Section 15 with agreements to seek new business for the new enterprise rather than for themselves, which was held subject to Section 15 in *Associated Banning Co. v. Matson Navigation Co.*, 5 F.M.B. 336, 342 (1957). Hence, there is nothing "surprising" about the propositions that

share respondents' confidence that the courts "never will apply the Clayton Act to mergers of foreign firms doing business with the United States" (RB 25). *Cf.* *United States v. Aluminum Co. of America*, 148 F.2d 416, 439-45 (2d Cir. 1945).

Congress did not intend to determine in 1950 the extent to which any agency listed in Section 7 had jurisdiction conflicting with that created by Section 7 or that all such agencies were included by Congress "in the interests of accommodation" (MB 23).¹⁸

D. Repeal of the Antitrust Laws by Implication.

Respondents concede the rule that the antitrust laws are not to be repealed nor their exemptions expanded by implication is "a settled one" (RB 27). However, they then assert that to imply merger jurisdiction for the Commission would not be an implied repeal of the antitrust laws, because Section 15 contains an express antitrust exemption. This strikes us as distinction without a difference. Whether the implication involved is in fitting mergers under a statute containing an exemption or in finding an antitrust exemption inherent in a statutory scheme is immaterial. In either case, repeal of the antitrust laws by implication is equally involved. Indeed, *Milk Producers Ass'n v. United States*, 362 U. S. 458, 469-70 (1960) involved an express exemption from Section 7 of the Clayton Act for transactions authorized by the Secretary of Agriculture and a refusal on the part of the Court to imply a merger jurisdiction in the Secretary.

Respondents push credibility to the breaking point when they assert that the Court in the *Carnation* case¹⁹ recognized that the Commission has merger jurisdiction (RB 29-30). *Carnation*, of course, had nothing to do with mergers. We doubt that the Supreme Court felt obliged to analyze each of the sections of the

18. Of course, it was generally thought in 1950, partly as a result of *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932), that the regulated steamship industry was broadly exempted from the antitrust laws. Indeed, the Commission chairman's "advice" to Congress in 1956 (RB 39) specifically relied on *Cunard*. The Supreme Court's later decision in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958) prompted a decided retreat from that position, as Chairman Stakem's 1962 testimony before the Celler Committee makes abundantly clear (MB 25-26).

19. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966).

Clayton Act to determine precisely which ones might fit under Section 15 before observing that Section 15 contains an express exemption from the Sherman and Clayton Acts.²⁰ Respondents' reliance (RB 29) on a footnote in *United States v. Philadelphia National Bank*, 374 U.S. 321, 350, note 27 (1963), is in a similar vein. Quite obviously, when the Court referred to the express exemptions in the Shipping Act, it was referring to the general exemption provision without regard to whether the exemptions covered mergers. Respondents fail to mention that the footnote referred to includes in its listing of other statutes Section 5b (9) of the Interstate Commerce Act (49 U. S. C. § 5b (9)) and the Webb-Pomerene Act (15 U.S.C. § 62), both of which, like Section 15 of the Shipping Act, grant antitrust immunity within defined limits, but neither of which includes *merger* immunity.

E. Other Agencies.

In our opening brief, we emphasized that every other agency that has power to approve mergers and exempt them from the antitrust laws has been *expressly* granted that power by Congress with standards made specifically applicable to mergers and authority to order divestiture (MB 30-37). We are not aware of a single case in which a court has found an implied authority in an administrative agency to approve mergers, and apparently the researches of respondents and the Commission have not uncovered any such cases either. The Commission's brief ignores this phase of the argument, but respondents pose a series of rationalizations for the differences in statutory schemes. Only two merit comment.

(1) The suggestion (RB 42-43) that other agencies with express merger jurisdiction also have promotional functions is a point we might have made. As respondents point out, the Mari-

20. We have previously suggested the sale of vessels with a covenant not to compete attached as an example of a non-merger transaction that would be subject to both Section 7 of the Clayton Act and Section 15 (p. 11). Moreover, Section 7 as initially enacted, which covered only stock acquisitions, and the exercise of Commission jurisdiction over "agreements" to merge would be mutually exclusive.

time Administration is given express merger authority by Section 608 of the Merchant Marine Act, 1936 (46 U.S.C. §1178). Prior to Reorganization Plan No. 7 of 1961 (75 Stat. 841), responsibilities under Section 15 and Section 608 were vested in a single agency. Hence, by analogy to the other statutes, the Maritime Administration has merger authority but the Commission does not.

(2) Respondents suggest that the CAB exercises merger jurisdiction under both Sections 408 and 412 of the Federal Aviation Act (49 U.S.C. §§ 1378, 1382). The important distinction is that agreements contemplating merger, but not mergers, are subject to Section 412, while mergers are subject to Section 408. The bone of contention here is that the Commission has purported to approve the merger itself pursuant to Section 15.²¹ By analogy to Section 412, the Commission has no such authority.

F. Orderly Regulation.

Our opening brief points out the confusing regulatory patchwork that results from the Commission's view of its merger jurisdiction (MB 37-40). The Commission's brief in turn suggests that the absence of merger jurisdiction in the Commission would create a "major loophole". Thus, "rather than enter into a cost sharing or profit sharing agreement which the Commission would disapprove the parties could simply merge". (CB 14.) This strikes us as farfetched. Moreover, even under the Commission's view of its jurisdiction, the parties are free to merge without Commission approval by stock acquisition.

The more important regulatory problem it seems to us is presented by a potential conflict in jurisdiction between Justice and the Commission. By creeping stock acquisition, initially subject to Section 7 of the Clayton Act, one carrier can gain control of another and then invoke the cloak of Commission jurisdiction over the entire transaction by entering into a merger agreement. This is essentially what has happened here (MB 37-38). Nor do we

21. Matson contended before the Commission that the instant agreement should be submitted to the Commission, but that Commission approval could not extend to the merger itself.

criticize the Commission "for not condemning the stock acquisitions of APL and Natomas in 1954 and 1956" (RB 25). It obviously had no power to do so. What we do criticize is the present exercise of jurisdiction and the Commission's regarding the earlier transactions as a factor favoring approval of the merger (MB 40).

III. THE COMMISSION'S APPROVAL OF THE MERGER IS NOT SUPPORTED BY THE RECORD.

A. The Erroneous Standards Applied.

The Commission has with one hand reached for jurisdiction over merger agreements on the theory that they are agreements "destroying competition". With the other hand it has granted absolution to the merger on the theory that mergers are not sufficiently anticompetitive to require application of the Commission's "antitrust test" recently approved by the Supreme Court in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 243-46 (1968) (the *Travel Agents* case). Self-evidently, if the Commission correctly invoked jurisdiction, it erred in failing to apply its antitrust test.

Under the rule of the *Travel Agents* case, any agreement that interferes with the policy of the antitrust laws will be approved by the Commission only if it finds that the agreement is "required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose" (390 U.S. at 243). The Commission admittedly did not apply that test here and did not make the findings that would be required if it had. In rejecting the test, the Commission relied on the Court of Appeals' decision in the *Travel Agents* case, which was subsequently reversed by the Supreme Court, and the assertion that the antitrust test would be applied only in the case of *per se* antitrust violations (R.D. 43, p. 30).

The Commission's brief does not even cite the *Travel Agents* case, and quite obviously regards its rule inapplicable to mergers (CB 16). Respondents are driven to a similar position, though they characterize the *Travel Agents* case as applying in the case

of a "*prima facie*" antitrust violation (RB 49).²² They say that the Commission's test is consistent with the *Travel Agents* case, presumably on the assumption the Commission found the merger was not even *prima facie* contrary to the antitrust laws. Such a contention merits no serious attention since the Commission found that this merger would produce a "high degree of concentration" in one of the markets considered (R.D. 43, p. 35).²³ Cf. *United States v. Philadelphia Nat. Bank*, *supra* at 364.

Respondents also contend that they "came forward with a prodigious amount of evidence of maritime transportation gains from this merger" (RB 49) and that the "Commission gave thoughtful attention to the transportation benefits resulting from the merger" (RB 56). Respondents correctly refrain from contending, however, that the Commission found the merger justified by a serious transportation need or important public benefits. Of course, the Commission made no such findings. There is no serious disagreement about what the Commission did find.²⁴ It found essentially that respondents' stockholders would benefit financially and that the merged company would be a more formidable competitor than each of the three lines operating separately. (MB 61-68; RB 56-57.) These findings were clearly insufficient under the doctrine of the *Travel Agents* case.

B. Respondents' Failure of Proof.

In addition to the Commission's failure to apply its antitrust test, it erroneously failed to require production of the kind of

22. The words used by the Court were "restraints which interfere with the policies of the antitrust laws" (390 U.S. at 243).

23. If the Commission were in fact to conclude that the merger would not interfere with the policies of the antitrust laws, it would at least need to make such a finding. But it expressly declined to do so: "[W]hether the 'relevant market,' for antitrust purposes, should be the liner market only, or liners plus nonliners, market share is by no means controlling as to the public interest. . . . It is by no means certain that the proposed transaction . . . would violate the antitrust laws; but . . . the Commission need not determine whether it would or not. . . ." (R.D. 43, pp. 35, 43.)

24. If respondents intended to suggest Maritime Administration policy was considered by the Commission (RB 59-60), they are mistaken. The Commission expressly disavowed such considerations (R.D. 43, p. 2).

information required from respondents to afford a balanced appraisal of the merger in the public interest (MB 68-73). Respondents reply that (1) "Matson bears its own responsibility for any deficiency it finds in the record" (RB 51) and (2) the details of the merger should be of no concern to the Commission (RB 61). There is a short answer to each of these contentions.

(1) It is within the sole power of the merger applicants to come forth with sufficient details to inform the commission of their plans, and they had the obligation to do so. *Anglo-Canadian Shipping Co., Ltd. v. United States*, 264 F.2d 405, 416 (9th Cir. 1959).

(2) Every other agency that regulates mergers requires details of the merger plan of the kind here withheld. As one example of the relevance here, the proposed mode of operation of the fleets of the merged companies subsequent to the merger is of crucial importance in assessing the competitive consequences of the merger. These are matters that respondents could have worked out with the Maritime Administration in sufficient detail to present its plans to the Commission. Their failure to do so is inexplicable.

CONCLUSION

For the reasons stated here and in our opening brief, the Commission's order should be reversed. If the Court holds the Commission had jurisdiction, the order should be reversed and the case remanded to the Commission for further proceedings.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules; and I further certify that I have examined the provisions of Rule 39 of said rules.

JOHN E. SPARKS

(Appendix follows)

Appendix

Exhibits Designated by Petitioner and References as to Their Admission into Evidence

Exhibit No.	Identified	Offered	Received
2	R.Tr. 22	R.Tr. 22	R.Tr. 23
12	R.Tr. 105	R.Tr. 214	R.Tr. 222
14	R.Tr. 141	R.Tr. 141	R.Tr. 141
16	R.Tr. 155	R.Tr. 155	R.Tr. 155
18	R.Tr. 162	R.Tr. 162	R.Tr. 162
20	R.Tr. 166	R.Tr. 167	R.Tr. 167
21	R.Tr. 186	R.Tr. 188	R.Tr. 933
28	R.Tr. 331	R.Tr. 334	R.Tr. 335
32	R.Tr. 456	R.Tr. 457	R.Tr. 457
37	R.Tr. 560	R.Tr. 581	R.Tr. 581
40	R.Tr. 592	R.Tr. 594	R.Tr. 601
41	R.Tr. 601	R.Tr. 602	R.Tr. 603
43A	R.Tr. 607	R.Tr. 607	R.Tr. 609
43C	R.Tr. 607	R.Tr. 607	R.Tr. 609
49	R.Tr. 666	R.Tr. 667	R.Tr. 667
62	R.Tr. 934	R.Tr. 940	R.Tr. 940
65	R.Tr. 995	R.Tr. 997	R.Tr. 999
80	R.Tr. 1095-96	R.Tr. 1096	R.Tr. 1097
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104B	R.Tr. 1255	R.Tr. 1255	R.Tr. 1255
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATSON NAVIGATION COMPANY,

Petitioner,

VS.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

BRIEF OF INTERVENING RESPONDENTS,
AMERICAN MAIL LINE LTD., AMERICAN PRESIDENT
LINES, LTD. AND PACIFIC FAR EAST LINE, INC.

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IN THE
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No. 22604

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Respondents.

BRIEF OF INTERVENING RESPONDENTS,
AMERICAN MAIL LINE LTD., AMERICAN PRESIDENT
LINES, LTD. AND PACIFIC FAR EAST LINE, INC.

STATEMENT

We consider the statement of petitioner to be substantially accurate but also to be insufficient foundation for the matters covered in argument. We accordingly make the following statement.

A. The Agreement

Agreement 9551 [R Ex. 14]¹ was filed for approval by the Federal Maritime Commission on May 25, 1966. Its preamble recites that the pressures of competition, especially

¹We cite the certified documents as "RD," the certified transcript as "RTr," and the certified exhibits as "REx."

from the merged Japanese lines, make imperative the integration of operations by American President Lines, Ltd., ("APL") and Pacific Far East Line, Inc. ("PFEL"), and the reduction of duplicating expense by APL, PFEL and American Mail Line Ltd. ("AML"); that the developing technology of the steamship industry requires the maximum of financial strength and operational flexibility; that the coordination of operations contemplated by Agreement 8485 has proved ineffective; and that it is necessary that the United States-flag lines in the trans-Pacific trades do all that may be feasible to improve the efficiency, economy and effectiveness of their operations. The salient provisions of the agreement are: (a) AML, APL and PFEL agree to merge or consolidate, with AML to be either a separate division or a subsidiary [Par. 2]. (b) Planning groups are established to develop the detail of the operating and corporate reorganization [Pars. 3, 4]. (c) The agreement will not be effective until approved by the Commission, the Secretary of Commerce, the Secretary of the Treasury, and by the stockholders of the merging lines [Pars. 7-11].

Public notice of the agreement was given on June 2, 1966 (31 F.R. 7183). Matson Navigation Company and States Steamship Company filed objections and requests for hearing.

B. The Hearing

By order of August 3, 1966 [31 F.R. 10621], the Commission instituted an "investigation to determine whether the Commission has jurisdiction over Agreement No. 9551, or any part thereof, and to the extent Agreement No. 9551 is subject to section 15, whether it should be approved, disapproved, or modified."

Prehearing conference was held in September, 1966. Respondents voluntarily supplied all material requested by Matson, States and the Commission's Hearing Counsel which the Presiding Examiner indicated to be proper and relevant. The resulting prehearing exhibits and responses served by respondents in October, 1966, aggregated 716 pages. Hearings were held in San Francisco over some 14 hearing days

in November and December, 1966. Some 2139 pages of testimony were taken, and 187 exhibits introduced.

The Department of Justice on the close of hearing intervened to urge that the Commission had no jurisdiction over merger agreements under Section 15 of the Shipping Act; it took no position on the merits of the merger and did not participate in the hearing.

C. The Respondent Lines

1. *Routes.* APL operates 25 vessels in four subsidized steamship services: (a) A trans-Pacific passenger service between California and the Far East; (b) A trans-Pacific freighter service, also between California and the Far East; (c) A Round-the-World service, operating from the North Atlantic and California to the Far East, Southern Asia, the Mediterranean and return to the North Atlantic; and (d) An Atlantic/Straits service, operating from Atlantic ports and California to the Far East and Southeast Asia and returning to California and the Atlantic ports [RD 43, pp. 7-8].

PFEL operates two services: (a) A subsidized trans-Pacific freighter service between California and the Far East with 10 vessels; and (b) An unsubsidized service between the U.S.-Pacific Coast and Guam with 5 vessels [RD 43, p. 9].

AML operates two subsidized services: (a) The so-called "short-run" service between the Pacific Northwest and the Far East, with 5 vessels; and (b) the Bay of Bengal service, with 4 vessels, between the Pacific Northwest and India-Pakistan, returning to California and the Northwest [RD 43, pp. 8-9].

The trans-Pacific freighter services of APL and PFEL follow almost completely duplicating routes between California and the Far East. The competition over this route by the APL Round-the-World and Atlantic/Straits vessels is of less importance, since they also load or discharge on the Atlantic Coast and in areas beyond the Far East. AML's Bay of Bengal service in theory has some over-lap with APL's services but owing to differences in routing and transit-time

the practical competitive effect is negligible. Only the two trans-Pacific freighter services of APL and PFEL offer significant possibilities of sailing coordination after merger [RD 43, pp. 9-10].

2. *Financial.* All three lines are in good though not spectacular financial condition. In 1965 APL had net earnings of \$5.5 million on \$133 million of assets; PFEL net earnings of \$4.8 million on \$80 million of assets; and AML net earnings of \$3.2 million on \$47 million of assets. In the aggregate they earned in 1965 about 5% on total capital [RD 43, App. B, C].

3. *Relationships.* Natomas Company owns 51.1% of the APL voting stock, with another 48.2% held by Signal Oil and Gas Co. [RD 43, pp. 3-4].

In 1965 APL bought about 2/3 of the AML stock and has since increased its holdings to 92.9%. Each of the stock acquisitions has been pursuant to permission of the Maritime Administration or the Federal Maritime Board. [RD 43, p. 3].

In 1956 Natomas purchased about 29% of the outstanding PFEL stock and now owns 39.1%. Another 9.2% of the PFEL stock is in hands related to Natomas [RD 43, p. 14].

The Antitrust Division, acting under the Civil Investigation Act of 1962, 15 USC 1311, very thoroughly investigated the relations among the three lines and concluded in 1963 to take no action [RD 11, pp. 187-188; R. Tr. 115-16].

4. *Coordination.* On August 11, 1960, the Federal Maritime Board approved Agreement 8485 among APL, PFEL and AML to establish a Coordinating Committee [REx. 49]. The objective of the three lines was that—

“* * * to the maximum extent feasible they should (a) eliminate any unnecessary expense which arises out of the maintenance of offices, terminals, facilities and personnel which are duplicated among themselves; and (b) eliminate any unnecessary or wasteful competition among themselves.”

The Coordinating Committee has recommended joint activity in several areas, each of which led to intercompany agreement duly approved under § 15: (a) Beginning in 1963, APL and PFEL have placed their hull and machinery insurance through a common broker. AML has recently joined the program. (b) A Los Angeles terminal is operated for the three lines by Consolidated Marine, Inc. (CMI), jointly owned by the three lines. CMI also does their husbanding in Southern California. (c) In July, 1966, the three lines agreed that CMI should establish a San Francisco office which would undertake the purchasing functions of the three lines and also set up joint electronic data processing. This economy is desired whether or not the merger is approved. Matson opposed approval of this agreement. The Commission approved the agreement [RD 26, pp. 35-37; RD 36, pp. 19-23, 27, 30, 35].

The intended objectives of the Committee have by no means been realized. So long as each line had its independent management and its independent shareholders, it could not, whatever the overall gain, be expected to agree to any step which would deteriorate its independent position [RD 26, p. 39].

5. *The Decision to Merge.* Natomas and its Board Chairman, Davies, have from time to time over the years considered the desirability of a merger of the three lines and have in the earlier years concluded against it. The savings from a merger were obvious, but Davies initially hoped that the principal benefits could be accomplished through the Coordinating Committee. Both AML and PFEL were well-managed and profitable, and the costs in reduced efficiency and morale during the transition period are large [RD 43, p. 13].

Natomas concluded in 1966 that a merger of the three companies had by then become necessary. The factors which led to that decision were many, and no one was controlling, but all made up a cumulative foundation for the decision:

(a) The Coordinating Committee had proved unable to realize more than a part of the benefits originally hoped for; (b) The potential administrative economies were shown by a report of the Coordinating Committee to be of impressive magnitude; (c) It was plain that a more effective utilization of the APL and PFEL fleets would result from sailing coordination, and that this could not be done short of merger; (d) There is a strong trend toward containerships and barge-carrying ships in the trans-Pacific trade, requiring expensive terminals and shore facilities which are more effectively used by joint than by separate operations; (e) The merger of the Japanese companies into a few large lines produced beneficial results and strengthened them. Those lines were about to undertake containerization of their services for which the six already merged lines were understood to plan a further recombination into two or three groups; (f) Finally, the vacancy in the office of president of APL which arose on May 1 presented a favorable occasion for the merger in that by persuading Ickes to take that position a principal need in the reorganization, the management of APL, could be met [RD 43, p. 13].

D. The Agency Decisions

The Presiding Examiner on May 18, 1967, issued a very comprehensive initial decision which held that Section 15 reached to merger agreements and that the agreement should be approved [RD 26]. All parties other than the respondents filed exceptions. These went largely to his conclusions rather than his specific findings of fact. After briefs and oral argument, the Commission on October 3, 1967, by a 3-2 vote held that Section 15 covered merger agreements. Of the three commissioners sustaining jurisdiction, one said the case should be remanded to receive evidence showing more specifically the merger plans and consequences; the other two commissioners concurred in the remand "although we consider the record in this proceeding now affords a sufficient basis upon which to take action" [RD 26, p. 18].

Respondents filed a petition for reconsideration, urging that the present record was in all respects sufficient and that the two commissioners who dissented as to Section 15 jurisdiction should go on to participate in the merits once the majority had taken jurisdiction [RD 38]. The Commission granted reconsideration and on December 26, 1967, issued a supplemental report on reconsideration [RD 43]. One of the commissioners who dissented as to jurisdiction joined in deciding the merits with the result that a majority of the Commission approved the merger agreement on the present record, with a fourth adhering to his view that a remand for further evidence was necessary and the fifth refusing to go beyond his view that there was no Section 15 jurisdiction. Respondents had suggested, in the interests of expedition, that the Commission so far as it deemed proper adopt the careful initial decision of the Examiner [RD 34, p. 123]. The Commission did so in its decision on the merits, in result of which pages 2-43 and Appendices A-I of the Commission decision [RD 43] correspond exactly with pages 25-35, 37-72 and Appendices A-I of the initial decision [RD 26].

SUMMARY OF ARGUMENT

I

The Commission after considering Matson's evidence and argument to support its claim of injury from the merger found that Matson would not in fact be affected. Matson has sought no review of this branch of the decision. In result it is conclusively adjudicated that Matson can suffer no adverse impact. It is not, therefore, a "party aggrieved" under 28 U.S.C. § 2344, and has no standing to seek review of any part of the Commission decision. *Interstate Electric Co. v. Federal Power Commission*, 164 F.2d 485 (CA 9, 1947). We deal with Matson's arguments out of caution, but are unable to see that they may be pressed upon this Court.

We have concluded that the Department's position in this Court does not fall with that of Matson. The United States is a statutory respondent under 28 U.S.C. § 2344, and by settled practice can urge any position it chooses. We believe this Court has jurisdiction, allowing the statutory respondent to present its case, even though the only petitioner for review is not a "party aggrieved." That is because (a) the Department became a proper adverse party before the Court should decide that Matson is not aggrieved, and (b) § 2344 should not be construed as an entrapment for the Department, which could have filed its own petition for review had it known that Matson very shortly before the statutory 60-day period ran would abandon its claim of injury or aggrievement.

II

Section 15 of the Shipping Act, 1916, requires that there be filed for Commission approval, "every agreement controlling, regulating, preventing, or destroying competition." A merger agreement is obviously covered by these plain words of the statute.

The case in truth is just that simple. None of the many ways in which the Department or Matson seek to escape these plain words can serve their need. For the more seriously pressed examples: (a) There is no warrant in the canons of statutory construction or in the sense of § 15 for the view that the entire reach of § 15 is limited by the concluding catch-all phrase "cooperative working agreement," or confined to those agreements which admit of continuing supervision. A number of other types of agreements admittedly covered by § 15 are essentially "one-shot" agreements rather than a continuing practice or working agreement. And, in any case, the Commission if circumstances so improbable should arise can withdraw its approval of the merger agreement, freeing the Department of Justice to seek

divestiture if it chose. (b) Both § 15 and § 7 of the Clayton Act reach in their literal terms to foreign mergers. Out of comity, neither the Department nor the Commission seeks to regulate foreign mergers. This does not mean that they are therefore inapplicable to domestic mergers. (c) The familiar plea that the antitrust laws should not be repealed by implication is inapplicable here, for as the Supreme Court has held § 15 offers express not implied exemption. That Court, indeed, has virtually settled this case in its statement that § 15 offers explicit exemption from the Clayton Act, *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 216 (1966).

The legislative history of § 15 is not very revealing, but does show a clear intention to bring under § 15 *every* agreement between carriers.

The agency construction must be accepted by this Court unless "it lies outside the range of permissible choices." The Commission surely is not irrational in applying the words of the statute just as they were enacted. For nearly 20 years, without a single deviation, the Commission has by decision and by advice to Congress taken the position that it has jurisdiction over merger agreements under § 15. In response to such advice, the Congress in 1950 added the Commission to the agencies whose approval exempted transactions from § 7 of the Clayton Act. Similar advice was given the Congress in 1956 and 1962. After a number of earlier cases, dealing with broadly similar agreements, the Commission in 1962 squarely held that it had jurisdiction over merger agreements. *Agreement 8555, AEIL*, 7 F.M.C. 125 (1962).

The Commission is not to be stripped of its clear jurisdiction over merger agreements because three other agencies administer later-enacted statutes which have express merger provisions. They in contrast to the Commission have sweeping promotional responsibilities and it is natural that mergers should be given specific attention. And surely a later drafting specificity does not reach back to contract the reach of general language in earlier statutes.

III

The Commission here applied the precise analysis many times approved by the Supreme Court: The antitrust policies of the nation are to be considered under the "public interest" clause of § 15. If the proposed agreement runs counter to these policies, it must be justified by serious transportation benefits. Since the Commission has recognized the need to weigh both policies, its decision on the merits of the agreement is primarily for the Commission and not for the reviewing courts. *Penn-Central Merger Cases*, 389 U.S. 486, 498-99 (1968).

The Commission properly found no significant affront to antitrust policies. The merger will discernibly reduce the competition of respondents only in the California/Far East trade. In that trade there were in 1964 some 650-700 sailings by 25 competing lines in addition to those of the respondents. The Commission found a considerable "cross-elasticity" between the liner and the non-liner trades, and considered that both should be taken in view. In terms of cargo carriage, the merged respondents would carry 26% of the liner commercial cargo and 8% of the total dry cargo.

The 26% might be a "danger area," the Commission held, but its importance was greatly reduced by the nature of the shipping industry. Ocean carriers are subject to Commission regulation; liner rates are fixed by steamship conferences and bulk rates by the tramp ships, and neither could be controlled by respondents; there is complete freedom of entry; and the foreign flag lines which are respondents' chief competitors have freely merged into large units. The Commission could also have developed the special limitation upon routes and sailings of subsidized lines, and the minute detail of their Government regulation, or the approved and immunized charter of these respondents to cooperate to avoid unnecessary competition, as further grounds for minimizing any antitrust concern.

Against this minimal impairment of antitrust policies, the Commission found impressive transportation benefits: admin-

istrative economies were available; coordination of sailings would permit more regular service and additional voyages with the same fleet; their financial strength would be increased, enabling respondents better to deal with the rapidly developing steamship technology; and by the merger respondents could better counter the recent and future mergers and consolidations of its Japanese competitors. Our opponents in the hearing gave substantially corroborating testimony. The Maritime Administration, which bears the promotional responsibility for the merchant marine, has long favored merger and consolidation of service.

IV

Matson asks also that the Court direct a remand for evidence additional to the prodigious amount already in the record. It finds two areas of deficiency, neither of which is persuasive. (a) Details of the reorganization plan and revised subsidy contracts are obviously of no concern in the Commission's area of responsibility, but are for the Maritime Administration as would also be any necessary protection of employees. That agency must also approve this merger before it may be completed. (b) Respondents are not able to make meaningful prediction of the trade conditions in 1972 when new vessel types will be in operation, and doubt that any guess of theirs or of the Commission as to the course of the Viet Nam war, the outcome of annual competitive bidding for MSTs cargoes, or the results of the containerization revolution, would be of any utility to anyone.

ARGUMENT

I

**ONLY THE ISSUE OF COMMISSION JURISDICTION
IS PRESENTED FOR DECISION BY THE COURT**

There has been in this Court a contraction of the issues and the parties in comparison with those before the Commission. We believe that petitioner, in abandoning any claim of its own injury, has lost its standing to press its theories about Section 15 but that, as this Court has jurisdiction, the Department of Justice may as statutory respondent make its argument as to the reach of Section 15.

**A. Matson Has No Standing To Seek Review
of the Commission Order**

1. *Matson is Conclusively Without Injury.* The Commission rules require that any party asking Commission action state "the petitioner's grounds or interest in the subject matter."² When Matson requested a hearing before approval of the merger agreement, it alleged that its "interest" in the subject matter of Agreement No. 9551 rested upon its "operation of unsubsidized vessels between the United States Pacific Coast and Hawaii" and its active exploration of "the possibility of instituting an unsubsidized waterborne service in Trans-Pacific trade including service between the United States Pacific Coast and the Far East."³ These respondents

²Matson participated as a party pursuant to Rule 3a of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.41, which in pertinent part provides that a "party who files a petition under . . . Rule 5(i), or a petition seeking relief not otherwise designated herein shall be designated as 'petitioner,'" and entitled to become a party to the proceeding. Rule 5(i), 46 C.F.R. 502.69, permits a claim for "relief or other affirmative action by the Commission" to be made by a written petition which, among other things, shall state "the petitioner's grounds or interest in the subject matter."

³Matson's Comments and Request for Hearing, June 20, 1966, at pp. 1-2. This document is not part of the record that has been certified to this Court by the Commission. We have, however, asked the Commission to file a supplemental certification which will include this material.

asserted that Matson in truth had no real “interest” in the proceeding. Matson answered that the question of its “interest” raised issues of fact that could only be resolved after a hearing.⁴

With the issue of “interest” thus joined, the Commission after hearing found that Matson had none. (a) As to the Pacific Coast/Hawaii trade, the Commission found the only connection with the merger to be that APL had filed for approval with the Commission a different and wholly separate agreement pursuant to which it would join with others to form a new company known as Hawaiian Lines to serve the Pacific Coast/Hawaii trade in competition with Matson. Although Matson claimed that it would be injured because the merger of APL, PFEL and AML would increase the financial strength of the company that would take APL’s place as a stockholder in Hawaiian Lines, the Commission held that “the merger is so remotely related to the Hawaiian Lines venture as not to be a material factor in whatever effect that venture might have upon Matson.” [RD 43, pp. 26-27]. (b) As to Matson’s claim that its proposed Pacific Coast/Far East containership service would be injured by the merger, the Commission found that “Despite Matson’s saturnine generalizations about the ‘potentiality for destructive competition’ from ‘further consolidation of respondents’ subsidized assets,’ the record does not establish any probability whatever that the proposed merger will have any injurious much less crippling impact upon the service Matson plans to inaugurate.” [RD 43, pp. 28-30].

Matson, neither in its petition for review nor in its brief, has in any way complained of or challenged the decision of the Commission in these respects.⁵ Accordingly, under Rule

⁴Matson’s Response to Reply to Protests and Requests for Hearing, July 16, 1966, at pp. 2, 5. This document, too, we have requested be included in a supplemental certification.

⁵We do not know why Matson chose not to seek review of the decision insofar as it held Matson to be without injury. As an oppo-

18, subsection 2(d), of the Rules of this Court, and the general rules of appellate review as well, Matson has abandoned, and the Court will not ordinarily consider, any contention that the Commission's findings should in these respects be overturned. *E.g.*, *Pinkston v. United States*, 278 F.2d 833, 834 (CA 9, 1960); *Greyhound Corp. v. Blakley*, 262 F.2d 401, 406 (CA 9, 1958); *Reynolds v. Lentz*, 243 F.2d 589, 590 (CA 9), *cert. den.* 354 U.S. 939 (1957). Even if the Court were nevertheless to examine this threshold issue, it could not find that the Commission's determination of no injury was without substantial support in the record.

2. *An Unaffected Petitioner Cannot Obtain Review.* Matson can obtain review in the Court only under 28 U.S.C. § 2344, which authorizes review on the petition of "any party aggrieved by the final order" of the agency. As Matson has been conclusively determined to be unaffected by the proposed merger, it is not a "party aggrieved" by its approval.⁶

This and other courts have so held. This Court's decision in *Interstate Electric Co. v. Federal Power Commission*, 164 F.2d 485 (CA 9, 1947), is directly in point. The Court there held that the petitioners were not "aggrieved" by the order of the Commission approving a merger of other electric companies which they sought to review. Its reasoning is equally applicable here. At the hearing before the Commission, in which the petitioners had participated, no finding was made—

"that any of them had any interest which might be affected by the order the Commission might make
* * *. The Commission's findings include no facts

ment, we naturally suppose this decision reflected a conclusion that its case was too weak to argue. In that event, Matson's course should have been that of States Steamship Company, and it should not have sought review by this Court.

⁶It is noteworthy that Matson's petition for review does not contain even a conclusionary allegation that it is a "party aggrieved." The omission of this statutory requirement can in the circumstances hardly be deemed inadvertent.

from which it could be said, as a matter of law, that petitioners are aggrieved; and the omission of such findings of fact is not here urged to be in error. Nor does the petition for review allege any facts in support of its barren recital that petitioners are aggrieved persons or parties.”

The petition to review was accordingly dismissed. See, also, *Panhandle Eastern Pipe Line Co. v. F.P.C.*, 219 F.2d 729, 731 (CA 3, 1955); *Pittsburgh Radio Supply House v. F.C.C.*, 98 F.2d 303 (CADC, 1938).

The rule is settled that the unaffected litigant before the agency, not being “aggrieved,” has no standing to seek review. Thus, in *United States Cane Sugar Refiners Ass’n. v. McNutt*, 138 F.2d 116, 120 (CA 2, 1943), the Court declared that the petitioners were not “adversely affected” or “aggrieved” by the agency regulations they challenged and thus lacked standing to seek judicial review. An adverse effect that, the Court said, confers standing must be—

“‘of sufficient immediacy and reality.’ *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 510, 512, 85 L.Ed. 826. [It] must be a result that is not only reasonably sure to follow the enforcement of the regulations but will be ‘something more than nominal or highly speculative.’ *National Broadcasting Co. v. Federal Communications Commission*, 76 U.S.App.D.C. 238, 132 F.2d 545, 548.”

In *Cincinnati Gas and Electric Company v. F.P.C.*, 246 F.2d 688, 691, 694 (CADC, 1957), the Court pointed out that an aggrieved party must be “actually” aggrieved and that his “aggrievement must be pressing and immediate, or at least must be demonstrably a looming unavoidable threat.” And in *Associated Industries v. Ickes*, 134 F.2d 694, 705 (CA 2) *vacated as moot*, 320 U.S. 707 (1943), the Court was careful to note that “not every person is a ‘person aggrieved’” and that a competitor, to be aggrieved, had to be threatened with financial loss through increased competition that resulted from the order of which he complained.

Again, in *Simmons v. F.C.C.*, 145 F.2d 578, 579 (CADC, 1944), the Commission denied the petitioner's application to reconstruct a radio station while granting the mutually exclusive application of the intervenor. The Court ruled that as the Commission had properly rejected the petitioner's application, he had no standing to seek review of the agency's decision in favor of the intervenor:

“Since appellant's application was rightly denied he has no ground for complaint. He does not contend that he is worse off than he would have been if intervenor's application, as well as his own, had been denied. Accordingly he is not ‘aggrieved’ or adversely affected’ by the granting of intervenor's application and has no standing to appeal from it.”

The same result was reached in *Simmons v. F.C.C.*, 169 F.2d 670, 672 (CADC, 1948), *cert. den.*, 335 U.S. 846 (1949), and *Mansfield Journal Co. v. F.C.C.*, 180 F.2d 28, 36-37 (CADC, 1950).

It is unimportant, as shown by all the cases above cited, that the non-aggrieved petitioner participated in the agency proceedings of which he seeks review. See, also, *Pittsburgh & W.Va. Ry. Co. v. United States*, 281 U.S. 479, 486 (1930); *Alexander Sprunt & Son v. United States*, 281 U.S. 249, 255 (1930).

✓ 3. *Matson is No “Private Attorney General.”* If Matson were able to show injury because of the merger, it would be able to challenge the decision below on issues based upon the public interest and would not be confined to the issues which injured Matson itself. But this is because the agency decision is to the private detriment of the petitioner, and he has a proper interest in its reversal on any ground. See *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Scripps-Howard Radio, Inc. v. F.C.C.*, 316 U.S. 4 (1942); *F.C.C. v. National Broadcasting Co.*, 319 U.S. 239 (1943); *Associated Industries Inc. v. Ickes*, *supra*. In such cases the petitioner is held to have standing to seek to overturn an agency order on any public interest ground whatever, but

only because the adjudication he seeks will result in his own private benefit by eliminating the grievance or adverse effect that gives him standing to appeal. See Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 253, 272-87 (1961). Where, as here, the party seeking judicial review has suffered no grievance or adverse effect as a result of the agency order that he wishes to challenge, he lacks the standing to assert that challenge even as a "private attorney general."

B. The Department of Justice Can Urge Its Complaint That § 15 Gave the Commission No Jurisdiction

We have given much thought to the resulting position of the Department of Justice in this Court and have concluded, despite the attractions of the contrary view, that its position and standing do not fall with that of Matson. The issue is complex and so far as we know has not arisen before, nor is it likely to arise again. Our reasons follow:

1. *The Department Was Not Required to Petition.* The Department intervened in the proceedings below on the single issue of Commission jurisdiction. The adverse decision of the Commission, we believe, left the Department "aggrieved" because of its interest in an uninhibited application of the antitrust laws. It could, then, have filed a petition for review of this issue. See *United States ex. rel. Chapman v. F.P.C.*, 345 U.S. 153 (1953); *Udall v. F.P.C.*, 387 U.S. 428, 439-40 (1967); Jaffe, *Judicial Control of the Administrative Action* (1965) at pp. 540-542.

The Department, however, did not file a petition for review. It relied, instead, on its position as a statutory respondent under 28 U.S.C. § 2344. One might once have urged that the Department's duty under § 2344 is to support the decision of the agency. But it is far too late for such a contention; the Department has for years felt free in those review proceedings to support or to attack the agency decisions just as it chooses. We conclude, accordingly, that the Department as a statutory respondent may present

its attack upon the Commission's decision that § 15 covers merger agreements *if* this case is properly pending in this Court.

2. *The Jurisdiction of this Court Has Attached.* A ruthless logic would suggest that, as Matson is not a party aggrieved, it cannot petition for review; as it cannot petition for review, the jurisdiction of this Court is not invoked by the Matson petition; as the statutory 60 day period has long since run, there is no way the Department can bring its complaint within the Court's jurisdiction. We cannot, for two reasons, believe that the Court would accept that logic, or that we should urge it.

(a) Up to the point that it determines that Matson has no standing, this Court has full jurisdiction of the case. Before it has reached that decision as to Matson's standing, the Department has entered the case as a statutory respondent and has presented an argument calling for decision of an actual controversy. We believe the result would be extraordinary if an argument proper when presented should evaporate into thin air because of a subsequent decision that another party had no standing.

(b) While it is not often that merger applicants feel called upon to guard against being unfair to the Department, an acceptance of the logic which we have rejected would present a serious question of fairness. Even if it had occurred to the Department immediately to examine the Matson petition for "standing," it was filed only a few days before the statutory period for review ran out. The Department, reasonably relying upon its position as a statutory respondent, could not possibly have filed its own petition for review after observing the defects of the Matson petition. We do not believe that 28 U.S.C. § 2344 should be construed so as to be an entrapment for the United States as a statutory respondent. *Cf. Consolidated Flowers Ship. v. Civil Aeronautics Bd.*, 205 F.2d 449, 452 (CA 9, 1953).

For these reasons we have concluded that the Department's arguments, though not those of Matson, are properly before the Court for decision.

II

SECTION 15 COVERS MERGER AGREEMENTS

A. The Plain Language of Section 15

1. *The Words Are Clear.* Section 15, in explicit terms, applies to “every agreement * * * controlling, regulating, preventing, or destroying competition,” between or among carriers.⁷

The crux of Agreement 9551 is the understanding and agreement of the three competing carrier signatories “to merge or consolidate,” under Paragraph 2, “into a single corporation, of which at least AML would be a separate division for steamship operations, or to merge or consolidate APL and PFEL into a single corporation with AML as a subsidiary.” A merger agreement quite obviously controls, regulates, prevents and destroys competition among the parties to it and must, therefore, when those parties are carriers subject to the Shipping Act, be filed for approval or disapproval by the Commission under Section 15.

This case is in truth just that simple: whether, for one reason or another, the Congress can be held to mean something other than what it said. It requires a compelling case to establish that conclusion. *Bouie v. City of Columbia*, 378 U.S. 347, 362-63 (1964); *Browder v. United States*, 312 U.S. 335, 338 (1941). No such case has been made.

Neither Matson⁸ nor the Department of Justice disputes that a merger agreement is covered by the literal words of § 15. Nor do they concede that this is the case, but push in silence past this central point to advance a variety of peripheral theories why Section 15 should be read as though amended to cover “any agreement * * * controlling, regu-

⁷The full text of Section 15 is reprinted as an appendix to Matson’s brief.

⁸Although we consider Matson has no standing to debate the issue, we deal herein with its arguments in case they be thought open to borrowing by the Department of Justice.

lating, preventing or destroying competition, *except an agreement to merge or consolidate.*" The following pages show that none of these theories permits escape from the plain words of Section 15.

2. *The Word "Merger" Is Not Used.* It is urged [DJ 4, Mat. 13]⁹ that as "merger" is not mentioned, so it cannot be covered. The argument if accepted would make a shambles of every statute where the draftsman has proceeded by general description rather than by a comprehensive particularization. It would as applied to this statute decimate the Commission's Section 15 jurisdiction, since many other types of agreements are similarly covered by general description rather than precise identification.¹⁰ We deal below (pp. 42-48) with the related argument that the existence of specific merger provisions in statutes administered by the ICC and CAB means that the Commission is powerless as to such matters under the Shipping Act.

3. *"Guidelines."* Matson finds an intent to exclude mergers in the absence of "guidelines" or standards by which the Commission, in supposed contrast to the agencies with specific merger language, is directed to reach decisions [Mat. 34-36].

The easiest answer is that this is a choice for the Congress, and that it chose to give precious few "guidelines" in the 1916 Act, whether in Sections 15, 16, 17 or 18. If detailed direction rather than general phrase is a requisite of jurisdiction, the Commission would be stripped of almost all its jurisdiction except for some issues under Section 14.

A second answer is that there is very little substantive choice between the 1916 Act and the statutes which Mat-

⁹We cite herein the brief of the Department of Justice as "DJ" and that of Matson as "Mat."

¹⁰A few examples are terminal leases, transshipment agreements, joint service contracts, agreements calling for joint discussion of common problems, joint purchasing agreements, and agreements fixing travel agents' commission or brokerage.

son finds adequately precise. They respectively prescribe these standards for approval or disapproval of mergers:

Shipping Act [46 U.S.C. 814]	ICC [49 U.S.C. 5(2)]	CAB [49 U.S.C. 1378]	FCC [47 U.S.C. 221]
1. Contrary to public interest	1. Consistent with public interest	1. Consistent with public interest	1. Public interest
2. Detriment to commerce	2. Adequate transportation service		2. Advantage to users
3. Unjustly discriminatory or unfair	3. Effect on other railroads	2. Creation of monopoly thus restraining competition or jeopardizing a carrier	
4. Violation of Act	4. Total fixed charges 5. Interest of carrier employees		

Indeed, in contrast to 47 U.S.C. § 221, enacted in 1934 to deal with telephone mergers, the Congress in 1943 provided in § 222 standards of great specificity, spelled out in 31 subparagraphs filling 9 pages, to govern telegraph mergers. The contrast is startling, and shows that Congress is even with the same agency quite capable of providing detailed standards or none, according to the needs or the accidents of the time or the drafting.

4. § 15 Is Confined to a "Cooperative Working Arrangement." The Department urges that Section 15 cannot apply to merger agreements because the section is limited to "co-

operative working arrangements” between separate lines [DJ 6-9, 15-17].

It is worth repeating the broad sweep of § 15. It requires Commission approval—

“ of every agreement * * * fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic, allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement.”

As the Supreme Court has recently held with respect to § 15, one should not take “an extremely narrow view of a statute that uses expansive language.” *Volkswagenwerk v. FMC*, 390 U.S. 261, 273 (1968). The Department’s view is not only “extremely narrow” but converts the usual rule of *eiusdem generis* into the startling principle that the whole preceding paragraph is limited by the concluding catch-all phrase, rather than the usual rule which matches the concluding phrase to the territory marked out by the preceding enumeration.¹¹

Beyond this defect of principle, the Department’s construction would tear out of the Commission’s jurisdiction a variety of agreements which have always been subject to Section 15. For example, neither the sale of a line or of a ship to a competitor, nor an agreement not to compete, can fairly be described as a cooperative working arrangement.

¹¹The Department was obliged to reach back to *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893) to support its principle of statutory construction and even then could produce nothing better than “*not citur a sociis*” as applied not to a catch-all conclusion but to the internal words of Section 10 of Article I of the Constitution.

5. *Continuing Supervision.* Matson and the Department urge that § 15 cannot reach to mergers because the Commission is unable subsequently to disapprove or to exercise a continuing supervision over the merger agreement [DJ 8; Mat. 13-14]. The Commission properly points out that this continuing supervision is appropriate and possible only with respect to a continuing practice, but that the Commission's jurisdiction is by no means so limited as to exclude agreements which in their nature do not involve an indefinitely continuing practice [RD 36, p. 11]. The decision is plainly right.

(a) The second paragraph of § 15 grants the Commission an additional power, to disapprove agreements already approved. It is in its nature a power which will be used but infrequently.¹² There are a number of agreements as to which the exercise of this power is not feasible: the sale of a ship or a service to a competitor are examples of agreements which have a practical immunity from reexamination by the Commission. So, too, is an agreement not to compete in the case of a competitor who would not want to compete in any event. But this practical immunity from subsequent disapproval does not mean that the Commission is stripped of its power to approve or disapprove these agreements under the first paragraph, nor that carriers are freed of Section 15 with respect to agreements which are in their nature largely immune from practical reexamination after they are first carried out.

(b) In any event, the merger agreement is just as any other agreement subject to subsequent Commission disapproval. This disapproval would not "unmerge" the companies, but it would free the Department of Justice to seek divestiture under the antitrust laws. It surely cannot be important, as

¹²"Section 15 authorizes the Commission to 'disapprove, cancel or modify any agreement,' not to sit in judgment of the day-to-day operations carried out under that agreement." *States Marine Lines, Inc. v. Federal Maritime Comm'n.*, 376 F.2d 230, 242 (CA DC, 1967).

Matson urges [Br. 36-37], that the enforcing agent for divestiture would be the Department of Justice rather than the Commission itself.

6. *Stock Acquisitions.* Matson urges [Br. 10-11, 37-38] that intercompany agreement is not always necessary to accomplish a merger, and that for merger jurisdiction to turn on the existence or nonexistence of a carrier agreement would be unsound. But merger without intercompany agreement is possible only with respect to corporations over 90% of whose stock is owned by the company into which it is merged. [Del. Corp. Law § 253]. Where there is substantial separation of ownership, both in Delaware and generally, and both before 1916 and at the present time, an intercorporate agreement is necessary.¹³

More generally, if the Congress in 1916 was concerned only with carrier agreements its provisions are not to be considered repealed because it did not concern itself with carrier shareholders. The same lack of sophistication, in terms of modern drafting, is apparent in all of the regulatory provisions of the Shipping Act. All of the provisions

¹³The Delaware General Corporation Law in Section 251(b) requires agreement between the corporations signed by their boards of directors before submission of a plan of merger or consolidation to the shareholders. The sale of assets reorganization here contemplated obviously requires agreement between the buying and selling corporations. See, generally, 15 *Fletcher, Corporations* 71 (1961 revision): "The steps and formalities required to bring about a consolidation or merger, though not identical under the various statutes, are substantially the same. Having decided to merge or consolidate, as the case may be, the corporations involved prepare a plan of union and enter into an agreement to effectuate it." The need for an intercorporate agreement to accomplish consolidation or merger was equally common prior to the enactment of the Shipping Act, 1916, as it is today. *E.g., Wells v. Rodgers*, 16 Mich. 525, 27 N.W. 671 (1886); *Bradford v. Frankfort, St. L. and T.R. Co.*, 142 Ind. 383, 40 N.E. 741 (1895); *American National Bank of Macon v. Commercial National Bank of Macon*, 254 Fed. 249 (CCA 5, 1918) (consolidation agreement dated 1914); *In re Interborough Consol. Corp.*, 267 Fed. 914 (S.D.N.Y. 1920) (consolidation agreement dated 1915).

of Sections 14, 15, 16 and 21 deal in simple terms with carriers and shippers, and without thought of shareholders and even without the "directly or indirectly" foothold for wrestling with technical evasions which is customary in modern drafting.¹⁴ But it is one thing to criticize the simplistic drafting, and quite another to put the Commission out of business, across the whole reach of its functions, because the 1916 Congress in ignoring shareholders did not explicitly deal with all possible routes to the same end.

Finally, insofar as Matson chides the Commission for not condemning the stock acquisitions of APL and Natomas in 1954 and 1956, it overlooks the facts that these were in no way immunized under Section 15 and that the Anti-trust Division made thorough investigation of the stock transactions and concluded to take no action (*supra*, p. 4).

7. *Foreign Mergers.* Matson urges [Br. 10, 13, 39] that as the Commission did not assume jurisdiction over the 1964 Japanese mergers, this must be a recognition that § 15 does not reach to domestic mergers.

It will be observed that this contention is not made by the Department of Justice. There is a very good reason for this forbearance. The Clayton Act itself reaches to foreign mergers with the same literal force as does Section 15.¹⁵ The Department, so far as we know and so far as we expect, never has applied and never will apply the Clayton Act to mergers of foreign firms doing business with the United States, so long as no American firm is involved.¹⁶ The argu-

¹⁴Only in Section 2, defining "citizen" for purposes of the vessel transfer provisions of Section 9, did the draftsman plunge into the shareholding reality back of corporate persons.

¹⁵Section 7 of the Clayton Act applies to any "corporation engaged in commerce," and Section 1 defines "commerce" to mean "trade or commerce among the several states and with foreign nations * * *" [15 U.S.C. 12, 18].

¹⁶Section 7 may well be applied to mergers of American and foreign companies. See *Bridges, Foreign Mergers under Section 7 of the Clayton Act*, 52 A.B.A.J. 360 (1966), and authorities there collected.

ment which proceeds from inactivity abroad to inapplicability at home should have more appeal to merger-minded businessmen than to the Department of Justice.

In 1964 the 11 major Japanese shipping lines were merged into 6 under the stimulus of the Japanese Government [RD 43, p. 17]. It requires no treatise on international law or the comity among nations to realize that it would have been an act of unprecedented overreaching if the Commission had asserted jurisdiction to approve or disapprove the Japanese mergers.¹⁷ They represented the required implementation of an act of a foreign government, which was accomplished on foreign soil between citizens of that foreign government. There would have been no more occasion for the Commission to apply the 1916 Act to those transactions than for the Secretary of Labor to apply the Fair Labor Standards Act, or the National Labor Relations Board to apply its Act, to Japanese crews and headquarters staffs in Japan.¹⁸

¹⁷It has been settled ever since this country took its place in the community of nations that its statutes would not be given extraterritorial application without a clear showing that the Congress so intended. The cases extend from *The Exchange*, 7 Cranch 116 (1812), to *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432 (1964). The courts have been alert in the maritime field to avoid imputing an extraterritorial intention to the Congress when the result might "invite retaliatory action from other nations." *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10, 21-22 (1963); *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 148 (1957); *Lauritzen v. Larsen*, 345 U.S. 571, 584 (1953). For these reasons, the courts have held the seaman's laws inapplicable even to U.S.-flag vessels in foreign ports where, despite their literal reach, they could not be applied to foreign vessels. *The State of Maine*, 22 Fed. 734 (S.D. N.Y. 1884; Judge Addison Brown); *Sandberg v. McDonald*, 248 U.S. 185, 194 (1918); *Neilson v. Rhine Shipping Co.*, 248 U.S. 205, 212-213 (1918).

¹⁸The Fair Labor Standards Act on its face covers *all* employees engaged in foreign commerce. 29 U.S.C. §§ 203(b), (d), (e), 206(a), 207(a). It has, however, been held inapplicable to workers in foreign lands. *Bernhard v. Metcalfe Const. Co.*, 64 F.Supp. 953 (D. Neb. 1946). The courts have similarly rejected the literal reach of the National Labor Relations Act to hold it inapplicable to the crews of foreign-flag ships even when in American waters. *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963).

If the Commission were stripped of its jurisdiction over domestic mergers because comity precludes control of foreign mergers, it would introduce a most startling imbalance into the regulation of ocean shipping. The Department of Justice does not and cannot enforce the antitrust laws against foreign mergers.¹⁹ If United States carriers were denied antitrust immunity, upon Commission approval, they would be condemned to compete without the benefits of merger except under antitrust standards while their foreign flag competitors were free to do as they chose.

8. "*Repeal by Implication.*" Both Matson and the Department, finally, place great weight upon the rule that the antitrust laws are not to be repealed, nor their exemptions expanded, by implication [DJ 11, 23; Mat. 26]. The rule is, of course, a settled one. It has, however, no application here.

(a) The cases relied upon involved a claim of antitrust immunity for a transaction which indisputably lay outside the defined area of agency power,²⁰ or an agency approval which though required by statute did not carry antitrust immunity,²¹ or a contention that the power to approve and to immunize so far superseded the antitrust laws that they were inapplicable to an *unapproved* transaction.²² There

¹⁹There are a dozen foreign-flag lines larger than the combined APL-PFEL-AML group, with two of them three to five times larger [RD 43, App. I]. All but one of these is in day to day competition with one or more of the respondents [RD 43, App. I; RTr 1501-06].

²⁰*Milk Producers Assn. v. United States*, 362 U.S. 458, 469-470 (1960; acquisition of assets of competitor not covered by marketing agreement exemption); *California v. Fed. Power Comm'n.*, 369 U.S. 482, 486, 489 (1962; stock acquisition not covered by certificate of public convenience and necessity provision relating to construction or acquisition of facilities).

²¹*United States v. RCA*, 358 U.S. 334 (1959); *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 350-355 (1963).

²²*Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966).

is here no issue of an “implied repeal” of the antitrust laws. We are dealing, with an *express* not an implied exemption. The question is whether it reaches to mergers. If it does not, we make no argument of any immunity, express or implied. If it does, the immunity is express and not implied. The “implied repeal” tag, as applied by our opponents to this case, is purest question-begging. Only if the merging companies do, not prevent or destroy competition among themselves, so that their agreement is not covered by the express words of Section 15, could there be any “implied” expansion of antitrust immunity in the application of Section 15 to a merger agreement.

Our point is established by the Supreme Court itself. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966) held the antitrust laws applicable to interconference agreements which had *not* been approved by the Commission. The conference argued that the Shipping Act contained its own sanctions so that even its violations were outside the reach of the antitrust laws. The Court made its meaning wholly clear.²³ It said (383 U.S. at 216-217):

“The Shipping Act contains an *explicit* provision exempting activities which are lawful under § 15 of the Act from the Sherman and Clayton Acts. This *express* provision covers approved agreements, which are lawful under § 15, but does not apply to the implementation of unapproved agreements, which is specifically prohibited by § 15. The creation of an antitrust exemption for rate-making activities which

²³If the Department, in citing *Carnation* to show the Congress gave the shipping industry a “limited antitrust exemption” [DJ 6], had quoted the entire passage it would have served our purpose rather its own. The passage [383 U.S. at 219] is: “Therefore, it seems likely that the Committee really only wanted to give the shipping industry a limited antitrust exemption. We do not believe that its purpose would be frustrated by the application of the antitrust laws to the implementation of conference agreements which have not been subjected to public scrutiny and examination by a governmental agency.”

are lawful under the Shipping Act implies that unlawful rate-making activities are not exempt.” [Emphasis added.]

Again, *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 350 (1963), held that the banking agencies could not by their approval immunize bank mergers from, and thus impliedly repeal, the antitrust laws. It said:

“No express immunity is conferred by the Act.”²⁷

“²⁷ Contrast this with the express exemption provisions of, e.g., the * * * Shipping Act, 46 U.S.C. (1958 ed. Supp. III) § 814 * * *.”

We do not understand that an exemption which the Supreme Court has recognized to be express, as it obviously is, can by repetitive assertion be converted into an “implied repeal” of the antitrust laws.

9. *Carnation Recognizes Merger Jurisdiction.* The passage quoted from the *Carnation* case immediately above notes that § 15 “contains an explicit provision exempting activities * * * from the * * * Clayton Act[s].” This can only refer to the Clayton Act provisions dealing in § 7 with mergers, for the Clayton Act contains no other prohibition likely to be in any way applicable to agreements among water carriers.²⁴

B. The Legislative History of § 15

Since the words of § 15 are clear, there is no ambiguity to resolve and an examination of the history of § 15 is supererogatory. That conclusion is reinforced by the fact that the legislative history itself is far from clear. Each side must in the end derive its conclusion by an inference from silence, a form of inquiry which is notably subservient to the conclusion already reached. We urge, however, that our infer-

²⁴The Court surely did not envision the application of Section 15 to discriminatory or tie-in sales of commodities by water carriers, nor to anything so anomalous as a carrier agreement to install interlocking directorates, 15 U.S.C. §§ 13, 14, 19 and 20.

ences are far more reasonable than those of Matson and the Department.

1. *Domestic Mergers.* The House Merchant Marine and Fisheries Committee was directed by H. Res. 587 of the 62d Congress to carry out a complete survey of all methods used to curtail competition in the shipping industry and to [48 Cong. Rec. 9159]:

“investigate and report to what extent any vessel lines and companies . . . engaged in our foreign or coastwise or inland commerce, are owned or controlled by railway companies [or] by other ship lines or companies”

The Committee made a thorough investigation. *Proceedings of the Committee on the Merchant Marine and Fisheries in the Investigation of Shipping Combinations* under H. Res. 587, 62d and 63d Congs., 1913-1914. Its report, known more commonly as the Alexander Report, comprises Volume 4 of its Proceedings.²⁵ The report repeatedly notes the destruction and control of competition in the coastwise and intercoastal trades by means of consolidations among water carriers [pp. 337-341 (Great Lakes bulk carriers); 352-353 (Alaska trade); 372-380 (New England coastwise trade); 383-386 (Middle and South Atlantic coastwise trade)]. See also, Huebner, *Steamship Line Agreements and Affiliations in the American Foreign and Domestic Trade*, 55 *Annals of American Academy of Pol. & Soc. Sci.* 75, 99 et seq. (1914) (summarizing the results of the investigation).

The Committee observed that competition in foreign commerce was controlled primarily through conference agreements [pp. 282-295, 415], whereas in the domestic trades control was for the most part exercised through control by railroads and “shipping consolidations” [pp. 403-404, 409].

²⁵The Alexander Report, as noted in *Volkswagenwerk v. F.M.C.*, *supra*, at 276, was incorporated into both the House and the Senate reports on the Shipping Act.

In foreign commerce, where competition was usually controlled through conferences and kindred agreements, the Committee recommended [pp. 419-420] that “any agreements, understandings, or conference arrangements” between carriers, without limitation as to their effect, be filed for approval. In domestic trades, where asset and stock acquisitions were the chief means of controlling competition, there were two primary problems; ownership of water carriers by railroads, and consolidations among competing water carriers. The Committee recommended that the ownership by railroads of canals and carriers using canals be prohibited [p. 424].²⁶

There was no flat prohibition recommended for water carrier consolidations. The Department and Matson would have the Court conclude that the matter was simply ignored, which would have been an extraordinary inattention to what the Committee felt to be a major concern. A far more reasonable conclusion is that this branch of the congressional concern was covered by the second recommendation of the Committee report [pp. 422-423]:

“(2) That water carriers be required to file for approval with the Interstate Commerce Commission all agreements or arrangements affecting interstate transportation, whether written or oral, and all modifications or cancellations thereof, with other water carriers, with railroads or other transportation agencies, or with shippers.”

²⁶The Shipping Act did not contain such a prohibition. This is undoubtedly because the recently enacted Panama Canal Act of 1912 (37 Stat. 560, 49 U.S.C. 5(14)) in Section 11 specifically forbade any railroad “to own * * * control or have any interest whatsoever * * * in any common carrier by water operated through the Panama Canal or elsewhere.” This the Alexander Report said would “go far toward eliminating some of the undesirable practices which were found by the Committee to exist in the domestic commerce of the United States.” The Department agrees as to this history [DJ 27-28] but derives the opposite conclusion from it.

If, as this history indicates, the Congress intended Section 15 to provide control over consolidation agreements in the domestic trade, its provisions reach equally to the foreign trade.

2. *Conference Agreements and Monopoly.* The Department and Matson place their case primarily upon two sentences out of the 424 pages of the Alexander Report [p. 416, DJ 20-23; Mat. 15-17]:

“To terminate existing agreements would necessarily bring about one or two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement.”

The Commission reasonably construed this passage to indicate a distaste for consolidations not subject to any governmental supervision, and a recognition that mergers of foreign lines could not be controlled by an agency of the United States [RD 36, pp. 7-8]. To this interpretation may be added that of the Presiding Examiner, that the Alexander Report was concerned with mergers and consolidations which resulted in a *monopoly* of the trade, which cannot be argued to be the case here, and was prepared to leave to the Commission's approval or disapproval the separation of the good from the bad [RD 26, pp. 12-14].

3. *The Comprehensive Purpose.* The Supreme Court's analysis of the legislative history of § 15 in *Volkswagenwerk v. F.M.C.*, 390 U.S. 261, 274-76 (1968), seems to us to be dispositive of the issue. We excerpt here, with emphasis as in the original, passages sufficient to mark the course followed by the Court:

“The Commission itself has not heretofore limited § 15 to horizontal agreements among competitors, but has applied it to other types of agreements com-

ing within its literal terms. * * * *Terminal Lease Agreement at Long Beach, California*, 8 F.M.C. 521 (1965), applying § 15 to lease agreements. In the latter case, the Commission said: 'Section 15 describes in unambiguous language those agreements that must be filed; * * * Since the wording of section 15 is clear, we need not refer to the legislative history; there is simply no ambiguity to resolve.' 8 F.M.C., at 531. * * * The legislative history offers no support for a different view. * * * While it is true that the attention of that [the Alexander] congressional committee was focused primarily upon the practices that had cartelized much of the maritime industry, it is clear that the concerns of its inquiry were far more broadly ranging. The report summed up the testimony before the committee: 'Nearly all the steamship line representatives . . . expressed themselves as not opposed to government supervision . . . and approval of *all agreements or arrangements which steamship lines may have entered into with other steamship lines*, * * * the shippers who appeared as witnesses . . . were in great majority of instances favorable to a comprehensive system of government supervision . . . [and] *the approval of contracts, agreements, and arrangements, and the general supervision of all conditions of water transportation*' * * * Nothing in the legislative history suggests that Congress, in enacting § 15 of the Act, meant to do less than follow this recommendation of the Alexander Report and subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry."

The Supreme Court, in short, has found in the legislative history ample confirmation of the congressional purpose, so clearly expressed in the text of § 15, to bring into the Commission's jurisdiction *all* agreements affecting transportation between common carriers by water.

4. *The Clayton Act.* The Department and Matson urge that the Clayton Act of 1914 shows that the Congress was able to deal specifically with mergers, and conclude that the

absence of comparably precise language in § 15 means that mergers were not covered [DJ 28; Mat. 17].²⁷

Section 7 of the Clayton Act was directed specifically to stock acquisitions substantially lessening competition and naturally used specific language. Section 15 was directed to *all* agreements, and naturally used general language. To be sure, the Congress which enacted the Shipping Act had no general distaste for the antitrust laws. But it is indisputable that in Section 15 they rejected the antitrust laws as governance for ocean shipping, and chose instead regulation through a system which required that all anticompetitive agreements be filed with and approved or disapproved by the Commission. Section 15 is, indeed, the most comprehensive description of anti-competitive practices ever made by the Congress,²⁸ and all if approved by the Commission were expressly exempted from the antitrust laws.

5. *The 1961 Amendments.* Matson urges at some length that the 1961 amendments to Section 15 support its interpretation [Br. 19-22]. Those amendments along with others were developed in the wake of *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958) and were concerned only with steamship conference activities. Mergers were nowhere mentioned in their extensive history. Matson derives some attenuated comfort from the fact that the Congressional spokesmen approved of conference agreements regulating competition and did not mention mergers. We

²⁷The Clayton Act was enacted on October 15, 1914 (38 Stat. 731). This was before the Shipping Act, enacted on September 7, 1916 (39 Stat. 728) but six months after the Alexander Report of March 2, 1914 [51 Cong. Rec. 4149-50] which so largely fixed the terms of that Act.

²⁸Section 412 of the Federal Aviation Act (49 U.S.C. § 1382), modeled after Section 15, comes the closest, but even that omits (a) giving or receiving special rates or advantages, (b) allotting ports or restricting sailings, (c) limiting traffic, (d) exclusive or preferential agreements, and (e) "destroying" any form of competition or limiting, etc., that which is not destructive or wasteful.

derive what we believe to be more substantial comfort from the fact that, although the agency position that it had jurisdiction over merger agreements was amply known (*infra*, pp. 38-39), none sought during the reenactment of § 15 to narrow its reach.

C. The Agency Construction

1. *The Weight to be Given.* There is no longer room for debate as to the weight to be given the construction by an administrative agency of the statute which it administers. The courts are the final authorities, and “are not obliged to stand aside and rubber stamp” the agency construction. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *NLRB v. Brown Food Store*, 380 U.S. 278, 291 (1965); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965); *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968). But in reaching their decision, the courts will give deference to the agency construction, and will accept it if it had a “reasonable basis in law,” or unless “it lies outside the range of permissible choices.” *NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1944); *Unemployment Commission v. Aragon*, 329 U.S. 143, 153-154 (1946); *Hardin v. Kentucky Utilities*, 390 U.S. 1, 8 (1968). It is surely a “permissible” or a “reasonable” conclusion that a merger agreement is one “controlling, regulating, preventing, or destroying competition.”

2. *General.* There is no “contemporaneous construction” of Section 15, whether with respect to merger agreements or anything else. A part of the explanation is that for the first decade of the Act there was virtually no privately operated ocean liner industry, as again there was none in the period of World War II. Another part is that the predecessors of the Commission can fairly be said to have been lethargic in their enforcement and application of the regulatory provisions of the Act.²⁹ As with virtually every other aspect of

²⁹An over-harsh indictment serves at least to illustrate the point. The Ocean Freight Industry, H. Doc. No. 1419, 87th Cong., 2d Sess. (1962), pp. 359-360: “For a period of about 45 years, lethargy and

the 1916 regulatory provisions, the first two decades of the Act contribute a largely blank page.

In more recent years there has been a very considerable record of agency construction of § 15 to cover merger agreements. Some of this has taken the form of advice to the Congress, and some of this has been accepted by the Congress. Other parts of this record of administrative construction consists of decisions of the agency. For convenience of presentation we separate these two parts of the record.

Some of the individual items would be inconclusive in themselves; others are entirely conclusive of the agency construction. Together they add up to nearly 20 years of unbroken acceptance by the agency of a § 15 jurisdiction over merger agreements. No single advice or decision of the agency during the 42 years of the life of the Shipping Act disclaims such jurisdiction.

3. *Advices to the Congress.* In 1950, 1956 and 1962 the Commission and its predecessors categorically advised the Congress that it had merger jurisdiction under § 15. This advice in turn was consistent with the natural interference from earlier advices in 1932 and 1937.³⁰

indifference have characterized its attitude, laxity and inefficiency its procedures, and frustration and ineffectiveness its administration of the regulatory features of the shipping acts.”

³⁰The House Committee in 1932 reprinted a 1930 recommendation of a presidential advisory committee that the Government should not sell additional lines to United States Lines: “If natural forces bring it [a consolidation of North Atlantic lines] about, the Shipping Board has it within its power to approve or disapprove of it, and to regulate it in the public interest.” Appendix to Hearings on Merchant Marine Investigation, House Committee on Merchant Marine, Radio and Fisheries, 72d Cong., 1st Sess. (1932) at p. 184. The Maritime Commission in its “Economic Survey of the American Merchant Marine” in 1937 urged [pp. 34-35] “the consolidation and merger of lines where economies, additional earnings, efficiency and flexibility may result.”

(a) In 1950 Congress in amending Section 7 of the Clayton Act added a new paragraph exempting from the reach of that provision “transactions duly consummated pursuant to authority given by” a number of federal agencies, including the United States Maritime Commission. As originally proposed and as passed by the House, the Maritime Commission was not among the agencies listed in the exemption paragraph. This prompted the Commission to write to the Chairman of the Senate Subcommittee considering the bill. After summarizing the text of Section 15 of the Shipping Act and quoting that part of it excepting approved agreements from the antitrust laws, the Commission said:³¹

“It does not appear that the provisions of H.R. 2734 are intended directly or indirectly to affect the above-quoted exemption from the Anti-Trust laws provided in section 15 of the Shipping Act. However, in view of the fact that the bill contains provisions specifically recognizing an exemption in respect of transactions approved by specified agencies under statutory authority, the Commission believes that the section in question should be amended to exempt from section 7 of the Clayton Act, as proposed to be amended by the bill, the transactions approved pursuant to authority given by the Maritime Commission under statutory authority such as the afore-said section 15 of the Shipping Act, 1916. This would avoid undesirable controversy which is likely to arise from any contention that the failure to include the Maritime Commission among the agencies specifically mentioned makes agreements approved by the Commission under Section 15 of the

³¹The careful and full letter of the Vice Chairman is quoted in full in the Initial Decision [RD 26, pp. 18-19]. The report of the Commission states that it is quoting the letter in full but by evident inadvertence omits the final paragraph quoted in the text above [RD 26, p. 15]. Matson, we suppose also by inadvertence, bases its argument on the assumption that the Commission letter in fact stopped short with the abbreviated quotation [Br. 22].

the Shipping Act of 1916, or other transactions approved under statutory authority of the Maritime Commission, subject to the provisions of section 7 of the Clayton Act.”

Since Section 7 of the Clayton Act is addressed solely to acquisitions of stocks or assets and to no other type of anti-competitive agreement or arrangement, the Commission’s letter necessarily establishes that the agency viewed Section 15 as applicable to merger or consolidation agreements.

So too did the Congress. The Senate Committee considered the Commission’s recommendation to be “justified,” S. Rep. 1775, 81st Cong., 2d Sess. (1950) at p. 2, and amended the bill accordingly. the bill was enacted with the Senate amendment.³² To be sure, the exemption paragraph as enacted did not confer new powers upon the Maritime Commission. But the acceptance by the Congress of the Commission’s recommendation evidences its understanding of the broad scope of Section 15. For Congress would not have bootlessly exempted stock and asset acquisitions “duly consummated pursuant to authority given by * * * the United States Maritime Commission” if indeed the Commission had no such authority to begin with.³³

³²“Subsequent legislation which declares the intent of an earlier law is not, of course, conclusive in determining what the previous Congress meant. But the later law is entitled to weight when it comes to the problem of construction.” *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

³³Matson urges that the Congress was simply acting “in the interests of accommodation” to any jurisdictional claim of an agency [Br. 23]. To reach this surprising verdict on the legislative function it relies on two cases holding that an agency mentioned in the § 7 exceptions had no power to immunize mergers. (a) *Milk Producers Ass’n. v. United States*, 362 U.S. 458 (1960), held the Secretary of Agriculture had no power in his regulation of agricultural marketing agreements to immunize mergers. But the Secretary was included because of the Packers and Stockyards Act, not the Agricultural Adjustment Act, and was added on the request of Congressman Kefauver himself, because that Act gave the Secretary “wide powers over the operation of meat packers, stockyards and livestock commission houses.” Hear-

(b) In 1956 the Chairman of the Federal Maritime Board advised the Senate Subcommittee on Antitrust and Monopoly that “merger agreements approved by the Board under Section 15 * * * and the resulting mergers, are exempt from Section 7.”³⁴

(c) In 1962 the Chairman of the Commission reported to the Antitrust Subcommittee of the House Judiciary Committee that “section 15 and our decision in the Isbrandtsen-Export Merger case constitute notice that merger agreements between common carriers subject to the Shipping Act, 1916, which control, regulate, prevent, or destroy competition or in any way provide for exclusive, preferential or cooperative working arrangements must be filed with the Commission, and that it is unlawful not to file such agreements promptly or to carry out such agreements prior to Commission approval.”³⁵

ings on H.R. 515, 80th Cong., p. 248. (b) *California v. Federal Power Comm’n.*, 369 U.S. 482 (1962), held only that the District Court need not stay a prior antitrust suit to enjoin stock acquisition because of a proceeding, filed a few days later, asking an FPC certificate of public convenience and necessity for the acquisition of facilities.

³⁴Hearings on Legislation Affecting Corporate Mergers, Senate Judiciary Committee, Subcommittee on Antitrust and Monopoly, 84th Cong. 2d Sess. (1956) at p. 527. The Chairman went on to explain why this exemption was necessary [*id.*, pp. 526-527]: “The application to common carriers by water and other persons subject to the Shipping Act, 1916, of a statute which prohibits a substantial lessening of competition would strongly tend to destroy the American merchant marine since the American merchant marine is the high cost competitor in this industry, and would tend to perpetuate chaotic conditions in the industry when such conditions result from overtoning of the trades or from other kinds of destructive competition.”

³⁵Hearing before the House Committee on the Judiciary, Subcommittee on Progress Report from the Federal Maritime Commission, 87th Cong., 2d Sess. (1962) at p. 23. Matson somehow reads this language to mean that the Commission asserted jurisdiction only over merger agreements containing an express and redundant agreement not to compete after the merger. It also relies upon testimony of the Chairman which in no way contradicts this advice, but says that if the merger plan “calls for a noncompete,” as any merger must, then the Commission should look at it [Mat. 25].

Congressman Celler, the Chairman, obviously agreed as to the § 15 jurisdiction, and was concerned only that the Commission give adequate heed to antitrust principles.³⁶ The final report of the Subcommittee discussed at some length the then pending § 15 proceeding relating to the American Export-Isbrandtsen merger without any question as to the agency jurisdiction.³⁷

4. *Agency Decisions.* From 1940 to 1962 the Commission or its predecessors applied § 15 to a variety of transactions which were reasonably similar to mergers. Thus, in *New York and Porto Rico Steamship Co.—Waterman Steamship Corp. Agreement*, 2 U.S.M.C. 453 (1940), the Commission held that it had Section 15 jurisdiction over an agreement providing for the sale of one carrier's good-will to the other for a ten-year period. The Commission asserted jurisdiction upon the ground that the sale necessarily implied an agreement not to compete—as does a merger agreement—and that therefore the agreement in issue controlled competition between the parties to it. In *Associated-Banning Co. v. Matson Navigation Co.*, 5 F.M.B. 336, 342 (1957), the Board noted that an agreement to transfer part or all of the parties' existing businesses to a new corporation jointly owned by them and to seek new business for the new enterprise rather than for themselves was an anticompetitive agreement that went "right to the heart of the practices enumerated in section 15." See also, *Agreements 8745 and 8745-1*, 7 F.M.C. 199, 200 (1962), where Section 15 was applied to an agreement for the sale of two vessels accompanied by the seller's covenant not to compete for one year.³⁸

³⁶Hearings, *supra*, note 35, p. 22.

³⁷The Ocean Freight Industry, H. Doc. No. 1419, 87th Cong., 2d Sess., pp. 47-48 (1962).

³⁸These decisions are reflected in the agency's usual practice of exercising jurisdiction over agreements providing for the sale or other transfer of assets from one carrier to another accompanied by a covenant, sometimes express and sometimes implied, that the buyer will

Finally, in *Agreement No. 8555, AEIL*, 7 F.M.C. 125, (1962), the Commission asserted § 15 jurisdiction and approved a consolidation of the common carrier operations of American Export Lines and Isbrandtsen Co., accomplished by an agreement between them to transfer Isbrandtsen's common carrier business, including 14 vessels and good will, to Export, and containing a covenant by Isbrandtsen not to compete with the transferred services without Export's consent. This was for all practical purposes a merger agreement, and the Commission was urged, in elaborate arguments by a competing line and by Public Counsel, to conclude that Section 15 was inapplicable to mergers. The Commission in unmistakably plain language rejected the contention [7 F.M.C. at 128]:

"We hold that Congress means what it says. Congress (by Section 15 of the Act) authorizes and requires us to approve, disapprove, cancel, or modify '*every agreement . . . controlling, regulating, preventing, or destroying competition.*' To read this language as authorizing and requiring us to approve, disapprove, cancel, or modify every agreement . . . controlling, regulating, preventing, or destroying competition *except agreements of the nature of the agreement here under scrutiny*, would constitute statutory *amendment* masquerading as statutory *construction*."

not use the assets in competition with the seller. Exhibits REx 67 through 74 are such agreements. They have all been approved under Section 15. Agreements 8176 [REx. 70], 8209 [REx 71] and 9566 [REx 73] provide for the sale of a steamship line from one carrier to another, much like the transactions proposed here. Agreements 8057 [REx 69] and 8525 [REx 72] provide for the sale or loan of but a single vessel, assuredly a less anticompetitive transaction than when all of a line's vessels are transferred. Agreements 7612 [REx 67] and 9498 [REx 74] provide for the creation of new corporations to take over operations that would otherwise be performed by the agreeing parties, exactly the situation in corporate consolidations. Agreement 7994 [REx 68] provides for the sale of a business for a twenty-year period although no physical assets were sold.

5. *In Sum.* Respondents suggest that the settled reasons for giving great weight to an agency's construction of its own statute apply here with great force. *Every* Commission statement and decision has pointed toward its § 15 jurisdiction over mergers, in some instances with the approval of the Congress or its committees. As to the *AEIL* decision the Chairman of the Commission advised (*supra*, p.):

“... that section 15 and our decision in the Isbrandt-sen-Export Merger case constitute notice that merger agreements * * * must be filed with the Commission, and that it is unlawful not to file such agreements promptly or to carry out such agreements prior to Commission approval. Thus, parties to such agreements do not have the option of filing the agreements for approval or carrying them out without Commission approval.”

Every dictate of orderly government indicates, when respondents, in May 1966, accordingly filed their merger agreement for approval, that they should not now be told that this was a 2-1/2 year folly, and that the Commission and its predecessors had “without a reasonable basis in law,” been guilty of a 20-year aberration.

D. The Merger Jurisdiction of Other Agencies

Matson and the Department each place heavy emphasis upon the specific provisions of the Interstate Commerce Act and the Federal Aviation Act, and incidental emphasis upon the Federal Communications Act, each providing for approval of mergers and consolidations, and urge that the absence of such provision in the Shipping Act means that the Commission has no corresponding power [DJ 25-27; Mat. 30-37].

1. *In General.* On the broadest level, it is evident in the first place that apples and oranges are being compared. The ICC, CAB and FCC have not only regulatory responsibilities but also sweeping promotional responsibilities. It is their job to ensure an effective transportation or communication system. It is not surprising, then, that mergers should not

be viewed in those statutes as merely a particular example in the general category of anti-competitive agreements, but should be given explicit attention. So, too, the promotional statute governing the shipping industry—the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U.S.C. 1101—in Section 608 calls specifically for prior approval by a different agency, the Maritime Administration, of mergers and consolidations. The Shipping Act, 1916, in contrast, is a purely regulatory statute, concerned almost exclusively with matters relating to competition and, in some contexts, with fair rates. Within the narrower and simpler range of its authority, there is no occasion to single out mergers for special treatment differing from that to be given any other agreement “controlling, regulating, preventing, or destroying competition.”

On the drafting level, our opponents’ argument is in essence that if the Congress in later statutes legislates in detail, the general provisions in earlier statutes must be read to exclude all matters which in the later statutes received detailed attention. The contention seeks to persuade the Court to ignore chronology and history. Many of the provisions of the Shipping Act, 1916, were copied in large part from the Interstate Commerce Act as it then read. However, that Act had no provision either comparable to Section 15 or relating specifically to mergers. It only went so far as to prohibit agreements for the pooling of traffic or revenues. 24 Stat. 380. Section 15, all will agree, applies to such agreements and many more. In short, Section 15 was intended to expand the Shipping Board’s regulatory jurisdiction over carrier agreements very far beyond the I.C.C.’s existing jurisdiction as to railroads. To be sure, Section 15 was drafted in much more generalized language than the later Transportation Acts of 1920 and 1940 and the Civil Aeronautics Act of 1938.³⁹ But this does not mean that

³⁹The Transportation Act of 1940 and the Civil Aeronautics Act of 1938 were enacted a generation later than the Shipping Act and reflect, among other things, a style of detailed draftmanship not found in the earlier statute. The specific provisions relating to consolidation

Section 15 is obsolete or nonenforceable. It does mean that the Commission must work with a more generalized set of basic directions than do the agencies with more nearly contemporary statutes.

The posture of our opponent's argument would have been greatly improved if the Shipping Act had been drafted *after* the later statutes. If, for example, the draftsmen had adapted the general Section 15 language from an existing statute and omitted a cognate merger provision, it could be argued with some force that no merger powers were intended. But it by no means follows, when a subsequent Congress deals in another field specifically with a subject covered generally in earlier legislation, that this reaches back to eliminate the specific area from the earlier general coverage.

Against this general background we turn to the statutes relied upon by our opponents.

2. *Interstate Commerce Act.* Congress did not enact Section 5b of the Act, which gives in terms comparable to parts of Section 15 a general authority to approve anticompetitive rate matters, until 1948. This was long after it had dealt in the most comprehensive way with railroad merger and consolidation. Section 407 of the Transportation Act of 1920 amended Section 5(2) to provide that the I.C.C. could approve a consolidation and immunize it from the antitrust laws if the consolidation was (a) in furtherance of a plan to be developed by the Commission for system consolidations throughout the country and (b) in the public interest. 41 Stat. 481, 482. Section 7 of the Transportation Act of 1940, 54 Stat. 905-06, recast Section 5(2) to

and control in the earlier 1920 Act were essential to the very proposition upon which the entire Act was based, i.e., that consolidation was necessary to the survival of adequate rail transportation in this country. Where a statute is primarily directed at accomplishing consolidation of rail carriers, it of necessity will contain specific provisions relating thereto. Where a statute is directed toward regulating anticompetitive conduct in all its many forms, it is hardly surprising that each such form is not given a specific provision of its own.

eliminate the Commission's plan of system consolidation and to permit Commission approval of mergers or consolidation which it found to be in the public interest, as that test should be applied to the inherently complex problem of an intricate railroad network with fixed tracks and fixed connections.⁴⁰ When Section 5b was enacted in 1948, in consequence of *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945), there was accordingly no occasion to cover merger agreements. The Congress did not do so; it used precise language in describing the kinds of agreements coming under the provision. It is directed to rate-making, not to all types of agreements preventing or regulating competition.

3. *Federal Aviation Act.* The Civil Aeronautics Act of 1938, 52 Stat. 973, enacted Sections 408 and 412 in terms substantially similar to those of the present law, 49 U.S.C. §§ 1378, 1382. Section 412 is modeled upon Section 15 and might if it stood alone serve, though somewhat less clearly than Section 15,⁴¹ to cover mergers, while Section 408 is directed specifically to mergers, consolidations and acquisitions of control.

We urge that in the absence of Section 408, merger and consolidation agreements among air carriers would be covered by Section 412, and that where no particularized provision is carved out of a general enactment, as is the case

⁴⁰The railroad complexities are so great as to make rail consolidation different in kind as well as in degree from air and shipping consolidations. The concurring opinion of Brennan, J. in *B. & O. R. Co. v. United States*, 386 U.S. 372, 397-438 (1967), and its annexed map, is vivid illustration of the problems produced by a densely interlocking system of fixed trackage, where a merger of two roads can have enormous consequences to connecting roads with no other access to through traffic and to towns and regions dependent upon the fixed trackage now serving them.

⁴¹It does not reach to agreements "preventing, or destroying, competition" but only to those "preventing * * * destructive, oppressive or wasteful competition."

with Section 15, the general enactment retains its usual meaning and is to be applied across the full range of its language.

Indeed, the CAB has gone farther and has indicated that, even with the particularization of Section 408, merger agreements are covered by Section 412 as well, though decision is of course controlled by the more specific provisions of Section 408. *Braniff-Mid-Continent Merger Case*, 15 C.A.B. 708, 727 (1952). In the view of the CAB, both sections are applicable to mergers and the standards of one section are "additional" to those of the other.⁴² In *Hartman v. North Central Airlines, Inc.*, 144 F.Supp. 885 (S.D. Ind. 1956), rev'd on other grounds, 241 F.2d 859 (CA 7, 1957), the District Court observed that both the acquisition of stock control by one carrier over another and the agreement providing for such acquisition had to be approved by the Board, 144 F.Supp. at 890-91, and asserted that "the first is governed by Section 408 * * * and the latter is governed by Section 412 * * *."

4. *Federal Communications Act*. The simple provision of 47 U.S.C. 221 relating to telephone company mergers seems to have provided no decision significant here⁴³ and the very complex code governing telegraph company mergers, 47 U.S.C. 222, has produced only one proceeding, merging the two domestic telegraph companies; that pro-

⁴² *Arizona-Monarch Merger Case*, 11 C.A.B. 246 (1950) ("This proceeding involves the matter of approval under sections 408 and 412" of a merger agreement); *Acquisition of Marquette by TWA*, 2 C.A.B. 1, 4 (1940) (contract for the proposed acquisition of one carrier by another is subject to approval "[u]nder sections 408(b) and 412(b)" of the Act); *United Airlines Transport Corp.*, 1 C.A.A. 723, 727 (1940) ("if a substantial part of the properties of any air carrier is subject to such contract or lease, * * * the additional [to section 412] test of the first proviso in section 408(b) must be met").

⁴³ As we have already noted, Congress provided the FCC with fewer standards to govern telephone mergers than it has given the FMC in Section 15 to govern maritime merger agreements (*supra*, p. 21).

ceeding in turn contains nothing of substantial significance here. *Application for Merger of Western Union and Postal Telegraph*, 10 F.C.C. 148 (1943); see *Western Union Telegraph Co. v. United States*, 267 F.2d 715 (CA 2, 1959).

5. *Divestiture*. Finally, Matson urges that as these three agencies (along with the Federal Reserve Board and the Federal Trade Commission) have under Section 11 of the Clayton Act the power to enforce the Clayton Act, and thus to order divestiture in cases of violation, this somehow means that only these agencies have power to approve merger agreements (Br. 36-37).

The legislative history of section 11 demonstrates beyond doubt that it was intended only to provide an additional remedy against antitrust law violators, 51 Cong. Rec. 14461, 15943 (Sen. Culberson); 51 Cong. Rec. 16319 (Rep. Floyd); S. Rept. 698, 63d Cong., 2d Sess (1914) at p. 41. Had Congress in 1950 considered agency section 11 enforcement powers essential to exemption for agency-approved transactions under section 7, it would not have included the Securities Exchange Commission, the Federal Power Commission, the Maritime Commission and the Secretary of Agriculture among those listed in the exemption paragraph added to section 7.

It is true that the Court in *California v. Fed. Power Comm'n.*, 369 U.S. 482, 486 (1962) in one passing sentence mentioned the Power Commission's lack of § 11 enforcement powers as confirming its conclusion that a power to approve the acquisition of facilities was not an implied power to immunize mergers. The relevance was not explained, and the brief passage is surely insufficient to make a Clayton Act enforcement power a condition precedent to a power to approve and immunize. This is made plain enough by the recent *Denver & R.G.W.R. Co. v. United States*, 387 U.S. 485, 501-02 (1967) which spelled out the different standards involved in approving a merger or consolidation under § 5 of the Interstate Commerce Act and, on the other hand, enforcing the Clayton Act against incipient violations.

The two functions are separate and unrelated, and not interdependent conditions to the exercise of either power.

III

THE COMMISSION PROPERLY WEIGHED BOTH THE TRANSPORTATION AND THE ANTITRUST POLICIES OF THE UNITED STATES

If we are right that Matson, for want of an interest of its own, has no standing, then this and the succeeding part of this brief deal with issues not before this Court. We discuss them only out of caution.

A. The Commission Applied the Correct Standard of Decision

This Commission has for some years been alert to its duty of weighing and balancing the frequently opposing requirements of antitrust and maritime policies. See, e.g., *California Stevedore & Ballast Co. v. Stockton Port District*, 7 FMC 75 (1962); *Mediterranean Pools Investigation*, 9 FMC 264 (1966); *Passenger Steamship Conferences—Travel Agents*, 7 FMC 737 (1964), 10 FMC 27 (1966), rev'd, 372 F.2d 932 (CA 2, 1967), in turn rev'd 390 U.S. 238 (1968). In the *Travel Agents* case, the Supreme Court on March 6, 1968, went out of its way to approve "the Commission's careful explanation on remand of the connection between its anti-trust standard and the public interest requirement." *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 244 (1968). Matson accordingly labors under some disability in its effort to show that the Commission lacks understanding of its task. It certainly does not establish that conclusion by its specific arguments, to which we now turn.

1. *Burden of Proof.* Matson's major attack is upon an artificial issue: who bore the burden of proof that transportation benefits outweighed any antitrust objections to merger [Br. 42-50].

(a) It matters not at all whether the burden of justifying a restraint of competition is one of going forward with the

evidence or is a substantive burden of proof. It matters not at all whether that burden arises on a showing of *any* restraint of competition, of a *prima facie* violation of the antitrust laws, or of an established or of an *per se* violation. The respondents came forward with a prodigious amount of evidence of the maritime transportation gains from this merger. The facts were contradicted by no party and the conclusions were accepted by the Examiner and by the Commission [RD 26, pp. 39-44; RD 43, pp. 13-18]. The respondents came forward, too, with an equally prodigious amount of evidence to show that the merger would have only negligible impact upon the policies of the antitrust laws. That evidence was uncontradicted, though our conclusion was disputed, and was discussed *in extenso* and accepted by the Examiner and the Commission [RD 26, pp. 44-45, 59-72; RD 43, pp. 18-19, 31-43]. Whether or not the burden of justification lay upon the respondents, they have carried it.

(b) If the academic question of burden of proof *is* to be debated, it seems evident that the Commission was correct. It recognized, first, that “The ‘public interest’ within the meaning of Section 15 includes the national policy embodied in the antitrust laws.” [RD 43, p. 31]. It then said that if either a “*per se*” or a “*prima facie*” violation of the antitrust laws is shown,⁴⁴ then “some serious transportation need or important public benefits must be shown to overcome the *prima facie* invasion of the public interest in competition” [RD 43, p. 31]. This is precisely the analysis made by the Supreme Court, two months later, in *FMC v. Svenska Amerika Linien* (390 U.S. at 243-246).⁴⁵

⁴⁴It used, in case there be a difference in the content of the words, “*per se*” once [RD 43, p. 30] and “*prima facie*” three times [RD 43, pp. 30-31].

⁴⁵The Court in *Svenska Amerika* said:

“The Commission has formulated a principle that conference restraints which interfere with the policies of antitrust laws will be approved only if the conferences can ‘bring forth such facts as would demonstrate that the . . . rule was required

Matson develops, over 9 pages, its views as to the sort of burden of proof the merger applicants should be required to carry [Br. 42-50] but at no point suggests where or how the Commission has formulated a different or a wrong standard. The inference from its concluding discussion of the scope of § 7 of the Clayton Act, of subsidy proceedings, and of the 1962 Inter Agency Committee [Br. 46-50] is that in truth it objects not to the formulation of the issue, or to the prefatory discussion of burden, but rather to the decision on the merits.

by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.' See F.M.C., at . In the present case, but for the partial immunity granted by the Act, both the tying and unanimity rules undoubtedly would be held illegal under the antitrust laws, and respondents failed to satisfy the Commission that the rules were necessary to further some legitimate interest.

* * *

"* * * Congress has, it is true, decided to confer antitrust immunity unless the agreement is found to violate certain statutory standards, but as already indicated, antitrust concepts are intimately involved in the standards Congress chose. The Commission's approach does not make the promise of antitrust immunity meaningless because a restraint that would violate the antitrust laws will still be approved whenever a sufficient justification for it exists. Nor does the Commission's test, by requiring the conference to come forward with a justification for the restraint, improperly shift the burden of proof. The Commission must of course adduce substantial evidence to support a finding under one of the four standards of § 15, but once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest,' unless other evidence in the record fairly detracts from the weight of this factor. It is not unreasonable to require that a conference adopting a particular rule to govern its own affairs, for reasons best known to the conference itself, must come forward and explain to the Commission what those reasons are. We therefore hold that the antitrust test formulated by the Commission is an appropriate refinement of the statutory 'public interest' standard."

2. *Matson's Position.* This brings us back again to the basic anomaly of Matson's position in this Court. It does *not* say that the Commission's conclusion is wrong, and in essence takes no position on that score [Br. 41, 73]. That, it claims, could be determined only upon a greatly expanded record. Yet Matson bears its own responsibility for any deficiency which it now finds in the record: no demand for data by Matson was refused, no Matson evidence was excluded, and no examination of respondent's evidence or witnesses was precluded. It is too late for Matson to rise above its own battle, and now to claim that it really cannot yet tell whether the merger should be approved or not.

We nevertheless show in the following pages that the Commission made very full and entirely adequate analysis both of the antitrust and of the maritime transportation policies as applied to the facts of this merger.

3. *The Decision is For the Commission.* It will be remembered, in our discussion of the evidence before the Commission, that if it correctly recognized its duty of appraising both the antitrust policies and the transportation benefits, as it obviously did, its decision on the merits is not to be lightly overturned. As the Supreme Court recently said in *Penn-Central Merger Cases*, 389 U.S. 486, 498-499 (1968):

"With respect to the merits of the merger, however, our task is limited. We do not inquire whether the merger satisfies our own conception of the public interest. Determination of the factors relevant to the public interest is entrusted by the law primarily to the Commission, subject to the standards of the governing statute. The judicial task is to determine whether the Commission has proceeded in accordance with law and whether its findings and conclusions accord with the statutory standards and are supported by substantial evidence."

B. There Is No Discernible Invasion of Antitrust Policies

1. *The Relevant Market.* The Commission, bearing in mind that the service patterns of the respondents were fixed by their subsidy contracts, found that there was a significant overlap in service only with respect to the trade between California and the Far East. It accordingly determined this to be the relevant geographic market. [RD 43, pp. 7-10, 32-33.] This is obviously a correct definition of "the area of competitive overlap, [where] the effect of the merger will be direct and immediate." *United States v. Philadelphia National Bank*, 374 U.S. 321, 357 (1963). It is not challenged by Matson.

Matson does object to the fact that the Commission took into view *both* the liner and the total dry cargo market, rather than looking to the liner market alone [Br. 54-55]. We can imagine no issue more clearly reserved to the expertise of the administrative agency. If its conclusion of "cross-elasticity" must be justified in this Court, it should be sufficient that, as the Commission found [RD 43, pp. 34-35], non-liners in this trade carry about half as much general or package cargo as do liners, while liners carry about 15% as much bulk as do non-liners. Otherwise viewed, 41% of outbound commercial liner cargoes are bulk cargoes and 81% of inbound non-liner cargoes are general cargo; the inbound general cargoes are divided 52% on liners and 48% on non-liners [RD 43, App. F].⁴⁶ It seems to us as to the Commission indisputably clear that in considering the merger of

⁴⁶Matson takes very considerable liberties with the decision of the Secretary of Commerce in *United States Lines-Subsidy, Route 12*, 5 P&F SRR 671, 674. The Secretary did *not* decide "that cargo carried by non-liners is not generally susceptible of carriage by U.S.-flag liner vessels" [Br. 55] but only that those types of bulk cargoes which were not in fact susceptible to that carriage, should be ignored in determining adequacy of U.S.-flag service. Such cargoes on remand to the Maritime Subsidy Board were found to be only coal and scrap iron. 5 P&F SRR 969, 974 (1965).

respondents' liner services one must look both at the liner and at the total dry cargo trades.

Matson renews its complaint in this Court that the Commission did not first adopt the liner trade alone, and then subdivide this into the U.S.-flag liner trade, to determine the relevant market [Br. 53-54]. The Commission rejected this subdivision in view of the obvious competition between U.S.- and foreign-flag vessels, and the small likelihood that the U.S. Government in determining the conditions for shipment of its "preference cargo" would be affected by this merger [RD 43, p. 34]. We cannot imagine that an agency decision of this nature would be reexamined in any court or that, if reexamined, it would be reversed.

2. *The Share of the Market.* Matson nowhere mentions what we believe to be the salient factor in consideration of the impact of the merger upon antitrust policies. There were in 1964 851 outbound liner sailings and 785 inbound liner sailings between California and the Far East; had the respondents been merged there would have remained 692 outbound and 652 inbound sailings made by 22 competing lines outbound and 25 inbound [RD 43, p. 18, App. D]. There is obviously no discernible tendency in this merger toward foreclosure of the market or exclusion of competitors.

In terms of cargo carriage the respondents in 1964 would have carried about 26.1% of the liner commercial cargo and about 7.8% of the total dry cargo in the trade [RD 43, App. G]. The Commission found that 26.1% represented a high concentration of cargo carriage, while 7.8% gives no cause for concern; it went on to note that most liner trades are "basically oligopolistic," so that there are relatively few liner operators [RD 43, p. 35]. It did not determine whether those shares of the market would be a violation of § 7 of the Clayton Act, because it was not its function to make that decision but only to locate the "danger areas" in order to weigh them in determining the public interest [RD 43, pp. 35-37]. Its decision seems obviously correct, and was based squarely upon recent and controlling Supreme Court

authority, *Seaboard Air Line R. Co. v. United States*, 382 U.S. 154 (1965); *Florida East Coast Ry. Co. v. United States*, 386 U.S. 544 (1967); *Minneapolis & St. Louis R. Co. v. United States*, 361 U.S. 173, 186 (1959). These cases have, even since the Commission's decision, once again been approved by the Supreme Court. *Svenska Amerika Linien, supra*, at 245 n. 4.

3. *The Context of the Shipping Industry.* The Commission, having thus isolated a "danger area" if antitrust principles were to be applied in the abstract, took the next step required in an antitrust analysis—an examination of the merger in the context of the particular industry [RD 43, p. 38].

It found: (a) Ocean carriers in the foreign commerce were subject to Commission regulation sufficient to prevent abuse. (b) Rates were fixed by steamship conferences and respondents would have only a minority vote (ranging from 1 of 7 to 1 of 18) in these conferences. (c) Rates on bulk commodities are fixed by the non-liner competition and could not be affected by respondents. (d) There is complete freedom of entry by any line into any ocean trade.⁴⁷ (e) The foreign-flag lines are wholly free of American antitrust policy and the respondents' major competitors, the Japanese-flag lines, under Government pressure had in fact merged into larger units [RD 43, pp. 38-40].

The Commission could appropriately have gone further, and recognized the special circumstances surrounding these lines because each is subsidized under the Merchant Marine

⁴⁷The Commission chose to rely upon Sen. Rpt. No. 860, 87th Cong., 1st Sess., which contrasts the ease of entry by non-scheduled carriers with the costs of establishing a regular liner service [RD 43, p. 39]. Matson converts this into a concession that there is not easy entry into the liner trades [Br. 57]. If the new liner operator buys his ships and establishes an elaborate shore-side organization, it is costly. But the evidence in this case showed that a liner service using chartered ships could be started with a very small investment and that this was very frequently done in the trans-Pacific trades [RTr. 1134-35].

Act, 1936. (a) Their routes and their minimum and maximum sailings are closely fixed by the subsidy contracts [RD 43, pp. 7-8] and can be expanded only with Maritime Administration permission after public hearing, Merchant Marine Act, 1936, Sec. 605(c). (b) The subsidy contracts provide that each operator "to the extent from time to time prescribed by the United States * * * shall * * * coordinate the spacing, regularity and frequency of its sailings * * * in conjunction with the operations of any and all other subsidized United States flag services * * *." [REx. 77]. There are compelling practical reasons why this authority cannot in fact be exercised by the Government, but the provision is eloquent testimony to the drastically limited area of competition considered proper for a subsidized steamship line. (c) The three respondent lines are removed by a still further step, and a long one, from the normal area of antitrust concern. They have entered into Agreement 8485, approved by the Commission and immunized from the antitrust laws [REx. 49]. Its basic objective is that—

"* * * to the maximum extent feasible they should
 (a) eliminate any unnecessary expense which arises out of the maintenance of office terminals, facilities and personnel which are duplicated among themselves; and (b) eliminate any unnecessary or wasteful competition among themselves."

(d) Beyond all of these specialized limitations upon free competition is the simple fact that the subsidized line is probably the most closely regulated industry in the American economy. We have summarized [in RD 20, pp. 91-99] the extraordinary reach and detail of this governmental supervision, which reaches to every aspect of operations, finances and policy and it would be redundant to repeat that summary here.

C. The Commission Properly Weighed the Transportation Benefits

Along with the foregoing considerations which show little if any impact upon the antitrust policies, the Commission gave thoughtful attention to the transportation benefits resulting from the merger. Matson has what we should suppose to be an impossible burden in persuading this Court to substitute its judgment for that of the administrative agency in a field such as this. We shall be correspondingly brief.

1. *Administration.* The Commission found: (a) The merger would strengthen management. (b) Administrative savings from consolidation of headquarters and branch offices would be about \$1.7 million a year, of which only about \$750,000 could be realized through "maximum theoretical use of the 'coordinating committee' procedures." [RD 43, p. 14].

2. *Vessel Operations and Cargo Carriage.* The Commission found: (a) Duplicating calls by APL and PFEL at minor ports would be avoided, while still giving adequate service to these ports. (b) This would permit the combined trans-Pacific fleets to operate about 4 additional voyages a year with the same vessels. (c) It would be possible to have a vessel of the merged trans-Pacific fleets on the San Francisco and Los Angeles loading berths every day of the year. (d) "With the flexibility provided by a larger fleet, schedules could be more readily and effectively adjusted to compensate for delays caused by wind and weather, port congestion, labor difficulties, breakdowns and the like." [RD 43, pp. 14-15].

3. *Financial Strength.* The Commission found: (a) While each of the respondents is in good financial condition, the industry historically is not attractive to investors and the abnormal cargo demands arising from the Viet Nam war may be hoped not to continue indefinitely. (b) Merger would permit easier accommodation to the recurrent delays in payment of operating subsidy receivables. (c) Earnings of the three companies, which vary out of synchronization, would be stabilized [RD 43, p. 16].

4. *Developing Technology.* The Commission found: (a) Containerization of the trans-Pacific trade is already at hand. (b) Shoreside facilities can be put to fuller and more economical use with a larger operation. (c) The increased financial strength of the merged companies will facilitate their adaption to the rapid technological changes. (d) With a larger fleet there is more flexibility and a greater opportunity to develop specialized vessels. [RD 43, pp. 16-17.] Only three weeks after the Commission decision, its analysis received authoritative support in *Penn-Central Merger Cases*, 389 U.S. 486, 500-501 (1968), where the Court said, so far as here relevant:

“The Commission carefully considered the implications of the fact that the Pennsylvania and the New York Central, as individual systems, have operated at a profit, and that there are reasonably good prospects for a continuation of such operation. But it was impressed by the fact that, as individual systems, these profits are not sufficient to put the roads in a position to make improvements important to the national interest, * * * The Commission emphasized that the merger would enable the unified company to ‘accelerate investments in transportation property and continually modernize plant and equipment . . . and provide more and better service.’”

3. *Japanese Mergers.* The Commission found: (a) In 1964 eleven major Japanese lines were merged into six. This was done in response to inducements provided by the Japanese government. (b) Each of the merged Japanese lines is larger than would be the merged respondents, and each operates in the trans-Pacific trade. (c) The Japanese lines have been strengthened by the mergers “and give promise of putting added pressure on respondents and other carriers to improve their economic performance” [RD 43, pp. 17-18]. To this, the Commission might have added that the record has uncontradicted testimony to the effect that the merged Japanese lines are expected to recombine again into two or three groups for container operations [RTr. 984-86].

6. *U.S.-Flag Participation.* The Commission found: (a) The share of the liner commercial cargo and of total dry-cargo carried in the trade from California to the Far East is steadily decreasing.⁴⁸ (b) It would serve the public interest, bearing in mind that merger restrictions operate only against U.S.-flag vessels, "to permit a merger that would improve the efficiency and ability to compete of U.S.-flag vessels serving this as well as less profitable trades, without stifling or excluding either U.S. flag or foreign flag competition" [RD 43, pp. 40-41].

7. *Respondents' Opponents.* Our opponents before the Commission included States Steamship Company as well as Matson. The ranking officials of each themselves testified to the transportation gains to be realized by the merger. Thus Dant has testified, for States, that the merger would permit respondents to offer more effective port coverage in the Far East, to increase the frequency of their service, to turn their vessels around more quickly, and better to use specialized vessels [RTr. 1469-72]. He has testified, with support in the Japanese trade press, that the merger might be sufficiently effective to provoke Japanese counter-measures [RTr. 1446, 1513]. Scott, for Matson, has agreed as to the effect of flexibility of service [RTr. 1713-15, 1718] and has complained that the merger would make respondents financially stronger [RTr. 1755, 1908] while their administrative economies through joint purchasing would give the respondents a competitive advantage [RTr. 1756-59].

⁴⁸It summarized the statistics in its Appendix H as follows:

"From 1954 through 1964, the percentage of liner commercial cargo carried by U.S. flag vessels between California and the foreign area of TR 29 decreased steadily from 74% to 43% outbound and from 60% to 37% inbound. Of total commercial cargo carried in dry cargo vessels from the same areas, the share carried by U.S. flag vessels decreased steadily from 56% in 1954 to 10% in 1964, outbound and from 59% in 1954 to 20% in 1964, inbound."

8. *Maritime Administration Policy*. It will be remembered that in 1961 the combined functions of the Federal Maritime Board were split, with the regulatory functions given to the Federal Maritime Commission and the promotional functions to the Maritime Administration.⁴⁹ The latter agency and its predecessors have regularly recognized that consolidation of competing lines is an effective and desirable method of strengthening our merchant marine. Thus, the United States Maritime Commission urged in 1937 that U.S.-flag carriers consolidate or merge if "economies, additional earnings, efficiency and flexibility may result." USMC, *Economic Survey of the American Merchant Marine* (1937), at pp. 34-35. Chairman Kennedy of the Commission believed that American lines had to consolidate into ten or twelve giants in order to compete with the large foreign-flag combinations. Editors of *Fortune*, *Our Ships: An Analysis of the United States Merchant Marine* (1938), at p. 151. In the same year the Commission urged that the two lines serving South Africa continue "efforts to effect a merger or consolidation" and, if unification could not be achieved, do whatever they could "to eliminate, as far as possible, competition between two American companies, and to enable both American companies to cooperate in competing against the foreign lines." *American South African Line, Inc.—Subsidy*, 3 U.S.M.C. 277, 287 (1938).

The Maritime Administration and its predecessors have sanctioned the unification of States Steamship with Pacific Transport Lines (FMB Annual Report, 1957, at p. 9); United States Lines with South Atlantic Steamship Line (FMB Annual Report, 1956, at p. 9); Moore-McCormack with Pacific Argentine-Brazil Line, Agreement 8176 [REx. 70]; Moore-McCormack with Robin Line, Agreement 9209 [REx. 71]; Grace with Pacific Republic Line, Agreement 9566 [REx. 73]; and the major merger between American Export Lines and Isbrandtsen Co., *Agreement 8555, AEIL*, 7 FMC 125. The Maritime Administration has actively encouraged

⁴⁹Reorganization Plan No. 7 of 1961, 75 Stat. 840.

merger between AML and APL [REx. 60; RTr. 845-49] and consolidation of passenger operations by American-flag carriers generally [REx. 79]. In short, consolidations among U.S.-flag lines have been considered as generally helpful and sometimes essential in achieving the goals of the 1936 Act.

9. *Economies and Efficiencies in General.* As we read Matson's argument it seeks to brush away this impressive catalog of transportation benefits by the argument that increased economy and efficiency benefit primarily the owners of the steamship lines [Br. 58-60]. The Commission supplied the practical answer: "that is what brings mergers about," [RD 43, p. 41]. It has for many years been settled as to carriers that "The public interest is served by encouraging efficiency in operation," *N.Y. Central Securities Co. v. United States*, 287 U.S. 12, 23 (1932). Here, as in *Penn-Central Merger Cases*, 389 U.S. 486, 500 (1968), the "evidence attested to the probability of a significant benefit from the merger, not only to the railroads and their investors, but also to shippers and the general public."

IV

THERE IS NO OCCASION TO REMAND THE PROCEEDING FOR ADDI- TIONAL EVIDENCE

As we have indicated, one of the five Commissioners is of the view that, while Section 15 gives the Commission jurisdiction over merger agreements, the case should be remanded for additional evidence [RD 36, pp. 24-27; RD 43, pp. 48-55]. Matson supports that dissenting opinion in this Court [Br. 68-73]. Here as with the preceding part of this brief, the issue is before the Court only if Matson has standing.

A. The Basic Confusion

Matson, as the dissenting Commissioner, demands in essence that the respondents, to obtain approval of their merger agreement, lay before the Commission for its decision a variety of details, such as those to be found in the

SEC proxy statement when filed, showing every corporate aspect of the proposed merger [Br. 69-71].

Matson forgets that, in contrast to the ICC and CAB upon whose practice it relies, the Commission does not have promotional responsibilities but only supervises carrier agreements with respect to the competitive matters covered by the Shipping Act, 1916. These respondents must not only secure the approval of their merger agreement under § 15 of the Shipping Act, but also a whole series of additional approvals from the Maritime Administration under the Merchant Marine Act, 1936.

The Commission quite properly refused to reach out to enter decision on matters not entrusted to it under the Shipping Act. Once it is realized that its concern, in contrast to that of the Maritime Administration, is limited to the competitive effects of the merger, to the balancing of antitrust policies and transportation benefits, it is evident that there is no defect of any sort in this very extensive record.

B. The Specific Complaints

1. *Plan of Reorganization.* Matson complains that the record does not contain the full plan of corporate reorganization, including apparently the stock valuations between the companies [Br. 69-70]. These matters, of course, must be examined and approved by the Maritime Administration before its final approval of the merger will be given. It is of no conceivable concern to Matson, or to any other competitor, how the corporate details are handled. It is of no concern to the Commission, nor to this Court in review of the Commission, since the corporate details cannot possibly have any bearing upon the degree to which the merger affects competition or the nature of the transportation benefits to be derived from it.

Not only are these details irrelevant under § 15, but an insistence that they be completed before approval would, in an industry as unstable as shipping, be a practical bar to any merger and in effect a contraction of the statutory juris-

diction. Shareholders of steamship lines simply will not agree on stock valuations some years in advance of the fact, and until that is at least substantially agreed it is close to impossible to draft plans of reorganization. But assuming these obstacles were overcome, the logic of Matson's position (to say nothing of its predispositions) would lead immediately to a demand for the revised subsidy contract negotiated with the Maritime Administration, the terms of the agreements with the Treasury Department, and the like. These matters simply cannot be accomplished on a contingent basis to be put into deep freeze awaiting some years of litigation.⁵⁰

2. *Future Fleets.* Matson insists that the Commission cannot act without detailed information on the method of operation of future fleets and in future circumstances [Br. 71-72]. We can only repeat what we said, to the presumed satisfaction of the Commission, in our petition for reconsideration [RD 38, pp. 9-10]:

“If we must prove as a ‘supportable conclusion’ the speculative and unpredictable future of the trans-Pacific steamship trades, we cannot gain approval of this merger. Specifically: (a) Two-thirds of the outbound cargo is related to the Viet Nam war; we can have no idea as to the nature of this movement in 1969 and 1970. (b) The carriage of MSTs cargo, at any stage short of a severe shortage of berth line space, depends upon the unpredictable result of the annual competitive bidding for this cargo. (c) The PFEL LASH⁵¹ ships will to be sure force a top-to-

⁵⁰We sought in our petition for reconsideration to reassure the dissenting Commissioner by suggesting that the merger agreement be approved subject to reopening within a stated period after the SEC proxy statement and the Maritime Administration subsidy contract had been filed with the Commission and the parties [RD 38, pp. 11-12]. The suggestion was opposed by the parties and ignored by the Commission.

⁵¹“Lighter-aboard-ship.” This is an untried concept of ocean transport by which cargo is loaded aboard barges which are lifted in mid-

bottom revision of the sailing plans of the merged company, but the first LASH vessel will not be delivered until mid-1970 and the last not until the spring of 1972. We cannot sensibly plan itineraries or map integration so far in advance. (d) The trans-Pacific trade is at the threshold of a containerization revolution; these respondents along with most other lines are in an earnest but not yet completed search for answers as to terminal facilities, vessel types, inland integration and a score of other novel problems. We should be delighted if we could in these areas offer 'supportable conclusions.' We cannot, and do not believe the Commission would be interested in guess-work.

"We thought when we prepared this case, and think today, that any such effort to prove the unprovable would be futile and meaningless, and would produce endless debate and controversy. We did just what steamship men do in forming their own decisions: we made our proof in terms of today, recognizing that tomorrow would be different but assuming that what is good today would also be good in the unknown context of tomorrow."

3. *Employees.* Matson would have this case sent back for an exegesis of the impact of the merger upon employees [Br. 72]. This is quite obviously unrelated to the Commission's § 15 responsibilities. It is more nearly related to the Maritime Administration responsibilities under the Merchant Marine Act, 1936, Title III of which is specifically directed to employee protection.⁵² If any employee-protective provisions were necessary, which we cannot believe,

stream aboard the ocean carrier by shipboard crane. It obviously will require a fundamental revision of many shipping practices.

⁵²Section 301 requires minimum manning and wage scales for seamen. It is true that with the passage of the years, the strength of the unions has become such that the Maritime Administration concern is now directed to what it feels may be excessive wages and manning. See, e.g., *Collective Bargaining Agreements*, 6 P&F SRR 1, 17, 25, 37 (1965).

the Maritime Administration not the Commission is obviously the more appropriate agency.

4. *Subsidy Recapture.* It can hardly need argument to show that the Maritime Administration, not the Commission, is the agency which has jurisdiction to bring subsidy "recapture" under the Merchant Marine Act, 1936, into consideration and to take whatever steps are necessary to protect the interests of the Government [Mat. 73].

CONCLUSION

For the foregoing reasons, the order of the Commission approving the merger agreement and dismissing the proceeding should in all respects be affirmed.

Respectfully submitted,

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May 17, 1968

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules; and I further certify that I have examined the provisions of Rule 39 of said rules.

I further certify that I have this day served a copy of the foregoing brief on each party of record by mailing three copies thereof via first class mail, postage prepaid, to the attorney of record for each such party.

Warner W. Gardner

APPENDIX

Respondents in compliance with Rule 18(f) of this Court list herewith the exhibits relied upon by them in the foregoing brief and the pages of the transcript of record before the Federal Maritime Commission wherein such exhibits were offered and received into evidence.

Ex. No.	Identified	Offered	Received
14	141	141	141
49	666	667	667
60	842	852	854
67 -	1043	1043	1048 -
74			1051
77	1061	1062	1062
79	1090	1090	1091

No. 22604

In the
United States Court of Appeals
For the Ninth Circuit

MATSON NAVIGATION COMPANY,

Petitioner,

vs.

FEDERAL MARITIME COMMISSION and UNITED
STATES OF AMERICA,

Respondents.

Brief of Petitioner
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*The table of exhibits in the designated record and references as to their admission into evidence required by Rule 18.2(f) of the Rules of this Court will be included in petitioner's closing brief, at which time designation of the record on review in accordance with the Court's order of March 4, 1968 will be complete.

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STATEMENT

I. Jurisdiction of the Court.

On February 14, 1968, Matson Navigation Company (Matson) filed its petition in this Court to review an order of the Federal Maritime Commission (the Commission). The order was purportedly issued pursuant to Sections 15 and 22 of the Shipping Act, 1916 (the Act), 39 Stat. 733, 46 U.S.C. §§ 814, 821. (The text of Section 15, as amended, is set forth in full at Appendix A.) This Court has jurisdiction and venue pursuant to 28 U.S.C. §§ 2342(3) and 2343.

II. The Proceedings.

On August 3, 1966, the Commission instituted an investigation for the purpose of determining whether it has jurisdiction pursuant to Section 15 of the Act respecting an agreement to merge among three common carriers by water, American Mail Line Ltd. (AML), American President Lines, Ltd. (APL) and Pacific Far East Lines, Inc. (PFEL), and, if so, whether the agreement should be approved, disapproved or modified (R.D. 1).¹ The agreement, denominated Agreement No. 9551 by the Commission, provides, *inter alia*, that the parties agree to merge or consolidate "in the form and by the procedures as the directors and shareholders of the three companies should approve" and that the three companies shall form planning groups for the purposes of planning the merger and coordinating operations of the three companies pending merger (R. Ex. 14, pp. 2-4).

Section 15 of the Act provides that all agreements, understandings and arrangements between or among common carriers by water and all modifications or cancellations thereof having certain enumerated effects upon rates and service; regulating, preventing or destroying competition; "or in any manner providing for an exclusive, preferential or cooperative working arrangement" must be filed with the Commission. The Commission must then, after notice and hearing, disapprove, cancel or modify any such agreement, understanding or other arrangement which it finds unjustly discriminatory or unfair among carriers or shippers, or operates to the detriment of the U. S. foreign commerce, or is "contrary to the public interest." The effectuation of any agreement within Section 15 is unlawful until approved by the Commission, and the Commission's approval exempts an agreement from challenge under the antitrust laws of the United States. (46 U.S.C. § 814.)

1. All record references are in accordance with the designation of documents contained in the Commission's certification of record filed herein on March 14, 1968. The documents numbered 1 through 45 in the certificate are cited by document number and page(s) (*e.g.*, R. D. 1, p. 1), the transcript of oral evidence below is cited by the transcript page(s) (*e.g.*, R. Tr. 1-10), and exhibits below are cited by exhibit number and page(s) (*e.g.*, R. Ex. 1, p. 1).

Each of the three parties to Agreement No. 9551 is a common carrier by water within the meaning of Section 1 of the Act (46 U.S.C. § 801) and receives operating differential subsidy (ODS) from the United States Government to operate dry cargo vessels, among other places, between ports on the United States Pacific Coast and ports in the Far East. In addition, PFEL operates an unsubsidized service between U.S. Pacific Coast ports and Guam, APL operates three subsidized trans-Pacific passenger vessels, and APL has recently announced its intention to acquire a controlling interest in a new steamship company which will operate in the California-Hawaii domestic trade. The combined fleets of APL, PFEL and AML total 45 cargo vessels and 3 passenger vessels. At the present time some 13 vessels are being constructed for the three lines under construction differential subsidy (CDS) contracts for operation in the subsidized trades. (R.D. 43, pp. 7-9; Ex. 91; Ex. 41, p. 4; Ex. 43 C; Ex. 143; Tr. 356-59, 791-92.) Upon consummation of the merger, the emerging company would have by far the largest fleet of subsidized vessels operating in the Pacific under the United States flag and would be one of the two largest subsidized United States flag operators (R.D. 43, App. I; Ex. 65; Tr. 91-92, 1004-06).

At the present time, effective control of the three merger applicants rests with Natomas Company (Natomas) and its principal stockholder, Mr. Ralph K. Davies. APL owns 93% of AML's outstanding stock. APL, in turn, is owned 51% by Natomas. Mr. Davies is Chairman of the Board of Natomas and Chairman of the Board of APL. Mr. Davies, AML and Natomas together own 45% of PFEL's outstanding stock. When the merger is consummated, Mr. Davies and Natomas expect to control the merged company. (R.D. 43, p. 5; Ex. 2; Tr. 49-51, 57-58.)

The program of acquisition that resulted in the present single control of the three merger applicants commenced shortly after World War II when Mr. Davies acquired a small block of APL stock, some 90% of which was then held by the United States Government, and was elected a director of APL. In 1952, Mr.

Davies formed American President Lines Associates, which then, together with Signal Oil Company, acquired all the Government's stock in APL. In 1954 APL acquired about $\frac{2}{3}$ of the outstanding stock of AML. In 1956 American President Lines Associates was merged into Natomas, and Mr. Davies was elected Chairman of the Board of Natomas. Shortly thereafter, Natomas purchased a block of 29% of PFEL's outstanding stock. In 1960, APL, AML and PFEL entered into and filed with the Commission a Section 15 agreement (Agreement No. 8485) which authorized them to form a coordinating committee for the purpose of eliminating certain types of competition among the three lines. Between 1954 and 1966 Mr. Davies and Natomas pursued a policy of acquiring PFEL stock and APL pursued a policy of acquiring AML stock until, by 1966, the present ownership relations resulted. (R.D. 43, pp. 3-4; Tr. 6-12, 93-96; Exs. 2, 49.)

Matson Navigation Company (Matson) and States Steamship Company (States) were denominated "petitioners" in the proceedings below by the Commission's order of investigation (R.D. 1). Hearing Counsel, an employee of the Commission, participated in the proceedings as a party on behalf of the general public as provided by the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.42). The United States Department of Justice (Justice) intervened for the purpose of presenting its contentions on the question of whether the Commission has jurisdiction over mergers among common carriers by water pursuant to Section 15 of the Shipping Act. (R.D. 17, 19.)

Matson is a common carrier by water operating unsubsidized passenger and cargo services in the California-Hawaii offshore domestic trade, and, since the early fall of 1967, it has operated an unsubsidized cargo containership service in the California-Far East trade. (R. Exs. 139, 142, 151, 152; Tr. 1656-1665, 1704-1709, 1718.) States is a common carrier by water operating subsidized cargo vessels between the United States Pacific Coast and the Far East, some of which make intermediate calls at Hawaii. (R.D. 43, pp. 19-20; Tr. 1745.)

Matson, States, Hearing Counsel and Justice all took the position before the Examiner and the Commission that the Commission is without statutory authority under Section 15 of the Shipping Act to consider, approve and exempt from the antitrust laws mergers between common carriers by water.² States and Matson further contended that Agreement No. 9551 is insufficient as a merger agreement and should be disapproved in any event because the merger applicants had failed to justify the merger as necessary to meet an urgent transportation need or confer an important public benefit. Hearing Counsel initially urged that the merger should be approved if the Commission found it had jurisdiction, but subsequently receded from that position, urging that the record was insufficient to support approval (R. D. 39, p. 4). Justice took no position respecting the "merits" of the case if the Commission be held to have jurisdiction.

Hearings were held before an Examiner of the Commission in November and December of 1966. On May 18, 1967, the Examiner issued his initial decision, in which he upheld the position of the merger applicants in virtually all respects. Exceptions to the initial decision were duly filed by Matson, States, Hearing Counsel and Justice, and oral argument was had before the full Commission on July 24, 1967.

On October 3, 1967, the Commission served its Report and Order. The Report consisted of four separate opinions and the Order remanded the case to the Examiner for further proceedings. (R. D. 36, 37.) One opinion, joined in by Commissioners Harllee and Barrett, held that the Commission has jurisdiction to approve Agreement No. 9551 as a merger agreement and to immunize the merger from the antitrust laws; and, while asserting the present record "affords a sufficient basis" for action (R.D. 36, p. 18), joined in remanding the case for the taking of further evidence in accordance with the opinion of Commissioner Hearn.

2. Matson also contended that the merger planning aspects of the agreement are subject to Section 15, though the agreement to merge, itself, is not.

Commissioner Hearn concurred in the opinion of Commissioners Harllee and Barrett on the jurisdictional question, but held that Agreement No. 9551 is "deficient as a matter of law" and should be remanded for the taking of further evidence on several specific matters. Commissioners Day and Fanseen, in separate opinions, held that the Commission has no jurisdiction over mergers. (R.D. 36, pp. 24, 28, 30.)

Before any further hearing could be held, the merger applicants petitioned the Commission to reconsider its decision and order of remand, which petition was granted November 17, 1967 (R. D. 42). On December 26, 1967, the Commission issued its Supplemental Report on Reconsideration and Order (R. D. 43). Again four separate opinions were written. Commissioners Harllee and Barrett rescinded their votes for remand and issued an opinion on the "merits", which merely republished the applicable portions of the Examiner's decision, approving the agreement in all respects. Commissioner Fanseen, though maintaining his position that the Commission does not have jurisdiction, concurred in the second Harllee-Barrett opinion "in the interest of maintaining the integrity of the administrative process" (R. D. 43, p. 46). Commissioner Hearn maintained his previous position that the agreement and the record are insufficient for approval under Section 15, again specifying the areas in which the record is deficient. Commissioner Day reaffirmed his position that the Commission does not have Section 15 jurisdiction respecting mergers and declined to join in the controversy on the merits.

III. Specifications of Error.

1. The Commission erred in concluding that it has jurisdiction pursuant to Section 15 of the Act to approve Agreement No. 9551 as a merger agreement with the consequence of conferring anti-trust immunity on the agreement and the contemplated merger.

2. If, contrary to Matson's contention, the Commission does have such jurisdiction, its purported approval of the agreement was erroneous. The Commission (a) failed to require the appli-

cants to bear the burden of establishing that the merger is justified by an urgent transportation need or the achievement of an important public benefit; (b) erroneously assessed the applicable standards in that the Commission failed adequately to appraise the anti-competitive nature of the merger and its consequent conflict with antitrust policy and, in this connection, relied upon impermissible grounds to mitigate the effects of this merger; (c) failed to make requisite findings of transportation need or public benefit; and (d) failed to require the applicant to produce a plan for merger and the information essential to a full appraisal of their proposal.

SUMMARY OF ARGUMENT

1. The Commission has, for the first time, clearly asserted jurisdiction under Section 15 of the Act to approve and clothe with antitrust immunity all mergers among United States-owned common carriers brought about by agreement. This construction leaves mergers other than by agreement and mergers among foreign-owned companies beyond the scope of the Commission's jurisdiction. The Commission's assertion of jurisdiction over mergers is erroneous for a number of reasons.

a. The language of Section 15 does not expressly confer jurisdiction to approve mergers. When the language of Section 15 is read as a whole, its intention to regulate continuing working arrangements among carriers clearly emerges. By reading the phrase "controlling, regulating, preventing or destroying competition" out of context, the Commission has *implied* a merger jurisdiction.

b. In enacting Section 15, Congress was concerned about prevalent abuse of cooperative agreements in the international shipping industry serving this nation's foreign commerce. Congress rejected the idea of prohibiting such agreements because it would lead to: (i) rate wars and elimination of the weak by the strong carriers and (ii) consolidation through common ownership. Congress concluded that the latter results could not be prevented by legislation. Congress therefore provided Governmental regulation

and antitrust immunity for the existing types of working arrangements among all carriers serving our foreign commerce, and mergers were obviously not so included.

c. The Commission's construction of Section 15 is contrary to the Supreme Court doctrine that repeal of the antitrust laws by implication is not favored.

d. Other regulatory agencies with power to approve mergers and impart antitrust immunity thereto have been given express authority with specific statutory standards for approval of mergers and power to order divestiture after approval.

e. For the Commission to exercise jurisdiction over mergers by agreement but not to exercise jurisdiction respecting mergers by stock acquisition or mergers among foreign-owned companies would be contrary to sound public administration and the public interest.

2. If the Commission does have merger jurisdiction over Agreement No. 9551, the Commission could not properly approve the agreement and the merger on the basis of the record before it.

a. It is well settled that the burden is upon an applicant for Section 15 approval of an anticompetitive arrangement to establish that it is justified by an urgent transportation need or an important public benefit. Merger agreements among competing carriers are as anticompetitive as other arrangements routinely subjected to Section 15 scrutiny. The Commission must require as strong a showing from the merger applicants as it would for any other anticompetitive arrangement. Inasmuch as merger effectively ends competition among the companies involved, there are a number of additional problems and policy considerations that the Commission must assess in deciding whether to approve a merger.

b. The Commission did not believe it necessary to require the applicants to establish that their merger is necessary to secure important public benefits or is based upon a serious transportation need.

(i) The Commission suggests that the burden of establishing justification for anticompetitive agreements applies only in the case of *per se* violations of the antitrust law, but it does not

determine what degree of concentration would result in the relevant service market from the merger; irrationally rejects U. S. liner carriage as a relevant service market; and ignores its own precedents in formulating and applying this new rule.

(ii) The Commission then purports to balance a number of factors against unresolved anticompetitive effects of the merger. It finds support in the regulated nature of the shipping industry, citing ICC cases as analagous, but fails to note that it does not have the extensive regulatory powers in the foreign trade that the ICC exercises respecting the carriers whose mergers it regulates. Various considerations of U. S. flag carrier promotion in competition with foreign operators and financial benefits to applicants' stockholders are relied upon, but the Commission then admits that promotion of the American Merchant Marine is not its proper concern. Finally, the Commission refers to the fact that all three merger applicants are presently controlled by Natomas Company, regarding that as mitigating the anticompetitive effect of the merger, without regard to the antitrust immunity its approval would impart to such concentration.

c. The principal justifications the Commission finds for the merger are financial benefits to be effectuated by eliminating redundant personnel and achieving operational efficiencies of various kinds. There is no finding, however, that the various financial benefits and efficiencies are required for the applicants to continue as highly effective and prosperous steamship operators, fully capable of developing their respective fleets and services.

d. The Commission issued its approval of applicants' merger without any evidence of the form which the merger would take, terms of agreement governing the consolidation transaction, plans for operation of the consolidated enterprise, plans for protection of displaced employees and the impact of the merger upon subsidy recapture and the public interest. The Commission must require a full disclosure of the applicants' entire merger plans before approving a merger.

ARGUMENT

I. The Commission Erred in Concluding It Has Section 15 Jurisdiction Respecting Agreement No. 9551 as a Merger Agreement.

A. THE COMMISSION'S DECISION CREATES AN INCOMPLETE AND ATTENUATED MERGER JURISDICTION.

It is important to note at the outset precisely what the Commission regards its jurisdiction respecting mergers³ to be. The decision does not hold that the Commission has jurisdiction over *all* mergers involving two or more carriers subject to the statute it administers. Rather, it holds that only those mergers brought about by *agreements* between two or more common carriers by water or other persons subject to the Act are within this Commission's purview.⁴ Thus, virtually all stock acquisitions of control, and any other merger form that can be accomplished unilaterally or without an agreement would be outside the Commission's purview.⁵ Further, the Commission holds that its jurisdiction over merger agreements is limited to steamship companies

3. We use the term "merger" in its generic sense to include the acquisition by one corporation of control over the business of another by stock acquisition, asset acquisition, statutory merger or otherwise. This definition is much broader than the term "merger" when used in its technical sense to connote a specific form of consolidation. *United States v. Philadelphia National Bank*, 374 U.S. 321, 335-42 (1963).

4. Section 1 of the Shipping Act, 1916 (46 U.S.C. § 801) provides, in part:

"The term 'common carrier by water' means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

"The term 'other persons subject to this act' means any person not included in the term 'common carrier by water', carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water."

Section 15 jurisdiction extends only to agreements among common carriers by water and other persons subject to the Act.

5. The gap in the Commission's jurisdiction over stock acquisitions is particularly pertinent here. Applicants have not committed themselves to a final form of merger (see pp. 69-70, *infra*) and might consummate the merger through stock acquisition from persons not subject to the Act

owned by citizens of the United States (United States-owned) and does not extend to foreign-owned steamship companies serving this nation's commerce (R.D. 36, pp. 8, 10).

The merger jurisdiction with its attendant power to confer antitrust immunity carved by the Commission thus contains enormous gaps. This, in itself, might not be a reason for rejecting the Commission's analysis if there were good reasons for providing Commission regulation in an area not otherwise under Government scrutiny or if there was compelling evidence that Congress intended for the Commission to exercise a somewhat attenuated merger jurisdiction. But this is not the case. Congress has provided through the medium of the antitrust laws a comprehensive scheme for Governmental control and regulation of mergers, and the Supreme Court has with increasing regularity given a broad sweep to the antitrust statutes and narrowly construed seemingly conflicting jurisdiction of regulatory agencies. Moreover, the available guides to congressional intent, rather than evidencing a purpose to clothe the Commission with jurisdiction to confer antitrust immunity upon the mergers of United States-owned steamship companies, establish an intent to fashion a regulatory scheme that would discourage consolidation of ownership among competing steamship lines and would be applicable alike to foreign and United States-owned steamship companies.

It will be seen that the Commission relies almost exclusively upon what it perceives to be the "plain language" of Section 15 for creation of its merger jurisdiction. Rather than relying on the other commonly accepted guides to statutory interpretation, the Commission's decision provides a series of rationalizations for ignoring their guidance. In the final analysis, the Commission is satisfied to conclude that "neither the language of section 15

and liquidation, rendering their "agreement to merge" mere window dressing which qualifies as a Section 15 agreement to obtain antitrust immunity. This is underscored by the present 93% APL ownership of AML, which may be unilaterally merged into APL (R.D. 43, p. 42). The 93% of AML stock was evidently acquired from persons not subject to the Act, and in fact was accomplished without Section 15 proceedings or approval. (R. Tr. 59-60.)

nor its legislative history show that Congress did not intend section 15 to cover agreements to merge" (R.D. 36, p. 12). The Commission has found nothing to show that Congress affirmatively intended to include mergers under Section 15.

As we now discuss in more detail, the Commission's jurisdictional conclusion does not have a reasoned basis in the statute or otherwise. It thus becomes the duty of this Court to set the Commission on its proper regulatory course.

B. THE PLAIN LANGUAGE OF SECTION 15 DOES NOT EXTEND TO MERGERS.

According to the Commission "an agreement to merge, since it eliminates all competition between the parties to the merger, is within the literal language" of that portion of Section 15 which requires the filing and approval of any agreement among common carrier by water "controlling, regulating, preventing or destroying competition" (R.D. 36, p. 5). We think this is quite demonstrably not the case, and we agree with dissenting Commissioners Day and Fanseen that the language of Section 15 does not extend to mergers either expressly or impliedly (R.D. 36, pp. 28, 31). This becomes apparent when, instead of isolating one phrase out of context, Section 15 is considered as a whole, which is the proper method of construing any statutory language. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949).

(1) Section 15 enumerates seven kinds of agreements that fall within the Commission's jurisdiction.⁶ Not one of these seven

6. The first paragraph of Section 15 reads in pertinent part as follows: "That every common carrier by water . . . shall file immediately with the Commission . . . every agreement with another such carrier . . . [1] fixing or regulating transportation rates or fares; [2] giving or receiving special rates, accommodations, or other special privileges or advantages; [3] controlling, regulating, preventing or destroying competition; [4] pooling or apportioning earnings, losses, or traffic; [5] allotting ports or restricting or otherwise regulating the number and character of sailings between ports; [6] limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; [7] or in any manner providing for an exclusive, preferential or cooperative working arrangement." (Bracketed numbers added.)

categories expressly refers to agreements for the combination or merger of steamship companies or for the acquisition of stock or assets of one by another. Indeed, the Commission concedes this and admits at a later point in its decision that "some implication is admittedly involved" in its conclusion that the plain language of Section 15 extends to mergers (R.D. 36, p. 18).

(2) The language of Section 15 extends to foreign-owned common carriers as well as to United States-owned carriers serving this nation's foreign commerce. Yet, the Commission construes its merger jurisdiction as extending only to United States-owned carriers (R.D. 36, p. 8), while its jurisdiction respecting all other types of Section 15 agreements among carriers extends to both foreign and United States-owned carriers. If any merger agreements fit within the plain language of Section 15, then all merger agreements do. To suggest that some do and some do not certainly raises grave questions about the plain language.⁷

(3) Of the first six categories of agreements enumerated in Section 15, five refer to specific types of agreements which could only encompass continuing working arrangements, and the seventh phrase is a catch-all referring to agreements "*or in any manner providing for an exclusive, preferential, or cooperative working arrangement.*" (Emphasis ours.) We think this language quite clearly characterizes the first six types of agreements. (See pp. 31-32, *infra*.)

(4) The second paragraph of Section 15, first sentence, explicitly obligates the Commission to maintain a continuing supervision over all Section 15 agreements, whether or not previously

7. It is no answer that Section 17 literally directs the Commission to regulate practices at foreign terminals but no such regulation has ever been attempted (R. D. 36, p. 8). No one argues here that Section 17 does not clearly provide for the Commission to regulate terminal practices, and its application to foreign terminals is beyond the issues in this proceeding. What is presented by Section 15 is the question of whether "implication" of United States-owned companies merger jurisdiction, where merger jurisdiction is *not* specifically provided for, can be read into a scheme of regulation otherwise directed at foreign and United States-owned carriers alike.

approved.⁸ It is quite obviously impossible to maintain continuing supervision over a merger agreement, and the Commission has no power, as do other agencies, to order the dissolution of a merger through enforcement of Section 11 of the Clayton Act (15 U.S.C. § 21) or otherwise.⁹

C. COMMISSION JURISDICTION OVER MERGER AGREEMENTS WOULD BE CONTRARY TO THE PURPOSE OF SECTION 15.

If there was any doubt about the language of Section 15, it is clear from the legislative history that its purpose was to regulate the exercise of monopoly power by steamship companies through conference agreements and working arrangements of various kinds prevalent in the international steamship industry serving this nation's foreign commerce. Congress did not intend to undertake direct control of monopoly power created by amalgamation of ownership among steamship companies.

8. *Empire State Highway Transportation Ass'n. v. FMB*, 291 F.2d 336, 339 (D.C. Cir. 1961), *certiorari denied*, 368 U.S. 931 (1961); *Mediterranean Pools Investigation*, 9 F.M.C. 264, 292 (1966); *Associated Banning Co. v. Matson Navigation Co.*, 5 F.M.B. 336, 341-45 (1956). Pursuant to that duty the Commission's predecessor has refused to approve a covenant not to compete of indefinite duration. *Matson-Dollar Agreements*, 1 U.S.M.C. 750, 754-55 (1938).

9. See pp. 36-37, *infra*. The Commission asserts "it does not follow, of course, that our approval of the agreement once granted can never be withdrawn or that we cannot order the agreement modified. Just what the consequences of such an action would be are not before us now" (R. D. 36, pp. 11-12.) We submit that once a merger is consummated pursuant to an agreement approved by the Commission, withdrawal of approval would be meaningless in the absence of power to order divestiture, which the Commission concedes it does not have (R. D. 36, p. 12). Further, the consequences of such action were before the Commission in determining whether merger agreements fit within the plain language of a statute requiring the Commission to maintain continuing supervision of all agreements approved. A reasoned consideration of this facet of Section 15 jurisdiction over mergers is implicit in the Commission's duty to find a "reasonable basis in the law" for a statutory construction which belies the congressional purpose to "insure that . . . immunity from the antitrust laws will be subject to careful control." *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 36 U.S.L.W. 4213, 4214-15 (U.S. March 6, 1968).

1. The Alexander Report.

In 1913 the House Committee on Merchant Marine and Fisheries, of which Representative J. W. Alexander was Chairman, undertook an extensive investigation into the practices of steamship conferences. At the time, there were several cases pending against foreign and domestic steamship companies for alleged violation of the Sherman Act.¹⁰ The findings and recommendations of the Committee are set forth in its report, known as the Alexander Report, and were adopted by Congress in enacting the Shipping Act, 1916.¹¹

The Alexander Report described at some length the various anticompetitive operating arrangements which had grown up in the international shipping community. The report found that "as regards nearly every foreign trade route, practically all the established lines operating to and from American ports work in harmonious cooperation, either through written or oral agreements, conference arrangements, or gentlemen's understandings." (H.R. Doc. No. 805, 63d Cong. 2d Sess. 281 (1914).) The report then discussed under separate headings several different types of agreements that were prevalent. These types of agreements are strikingly similar to and the undoubted source of those enumerated in the first paragraph of Section 15. It is worth noting that merger agreements are not among those enumerated in this part of the Alexander Report.¹²

The Committee found that there were many predatory practices arising from such arrangements. Nevertheless, the Committee

10. See e.g. *United States v. Pacific & Arctic Co.*, 228 U.S. 87 (1913); *Thomsen v. Union Castle Mail S.S. Co.*, 166 Fed. 251 (2d Cir. 1908), *affirmed* *Thomsen v. Cayser*, 243 U.S. 66 (1917).

11. For an authoritative discussion of the Alexander Report and its background, see *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 488-90 (1958).

12. At pages 282-286 of the Alexander Report the devices commonly used to regulate competition among foreign commerce carriers were enumerated. The implication is strong that agreements to regulate competition between lines or conferences where trade routes intersect or adjoin and conference members' covenants not to compete independently with the con-

recommended against a flat prohibition of such agreements because restoration of unrestricted competition would lead to two greater evils, and one of the two greater evils was corporate consolidation through common ownership. The Committee stated its conclusion as follows:

"To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement." (*Id.* at 416).¹³

It seems apparent that the foregoing quotation refers to three evils: (1) monopoly power achieved by agreement among carriers, (2) monopoly power achieved by consolidation among carriers, and (3) monopoly power achieved by large carriers as the end result of rate wars. The Alexander Committee concluded that the type of monopoly power achieved by agreement, being susceptible to continuing regulation by public authority, was less inimical to the public interest than monopoly power achieved through consolidation or by eliminating the weak carriers through rate wars. The Committee therefore recommended to Congress that the United States undertake to regulate agreements among carriers and exempt those agreements from the antitrust laws with the hope of forestalling the greater evils of rate wars and consolidation of ownership among competing carriers.

It is possible to speculate why Congress did not believe it could successfully prevent rate wars and mergers among carriers

ference trade, enforced by a cash deposit with the conference, were the devices which correlate with the "controlling, regulating, preventing or destroying competition" standard finally included in Section 15. The other devices were rate agreements; traffic apportionment by sailings and port allotments; maximum freight volume limitations; and freight revenue pools.

13. The Supreme Court has very recently referred to this part of the Alexander Report as the "genesis of the Shipping Act." *Volkswagenwerk A.G. v. FMC*, 36 U.S.L.W. 4197, 4201 (U.S. March 6, 1968).

in the international shipping community by regulatory legislation. However, the significant points here are that Congress clearly regarded them as separate problems, that Congress did expressly undertake to regulate agreements, and that Congress did not expressly undertake to regulate corporate consolidations or minimum rates.

It must be borne in mind that the same Congress that issued the Alexander Report also enacted the Clayton Act, *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966), and had specifically taken steps in Section 7 of the Clayton Act (38 Stat. 730) to deal with mergers by prohibiting consolidation of corporate control through stock acquisitions, the form of merger then most prevalent, tending substantially to lessen competition. If Congress had wished to include merger jurisdiction in Section 15, it seems only reasonable that it would have used specific language similar to that used in Section 7 of the Clayton Act.¹⁴ Indeed, as we have seen, the Alexander Committee itself referred to the problem of mergers among steamship companies serving the foreign commerce of the United States. In doing so, it characterized mergers as being a separate problem from agreements, stating that "*In addition to the combinations by agreement there are numerous instances of consolidations among steamship lines by actual amalgamation or through stock control of subsidiaries*" (*Id.* at 301, emphasis ours).

It also seems worthy to note that the great majority of the steamship companies serving the United States foreign commerce in 1914 were foreign-owned companies (*Id.* at 59-60, 91, 110-

14. The Commission reasons (R.D. 36, pp. 10-11) that Section 7 of the Clayton Act governed control by stock acquisition, the Sherman Act governed merger by agreement, and somehow application of Section 15 to mergers by agreement is consistent with this scheme. This reasoning would compel the conclusion that Section 15 was enacted to exempt mergers by agreement from the less restrictive prohibitions of the Sherman Act but left control by stock acquisition subject to the more severe prohibitions of Section 7 of the Clayton Act. Such an illogical intention and result are, of course, very persuasive reasons for construing the statute as having left all mergers subject to regulation by the Sherman and Clayton Acts.

111, 154-155) and that the principal consolidation problems noted by the Committee were among foreign-owned lines (*Id.* at 301; R.D. 36, p. 7). The primacy of foreign-owned carriers by water in U.S. foreign commerce was still evident in 1961. (See 107 CONG. REC. 18241 (1961), quoted at page 21, *infra.*) Unless the Congress were to undertake the somewhat drastic measure of regulating mergers among foreign companies, the regulation of mergers among United States-owned steamship companies would have been of little importance insofar as the problems of this nation's foreign commerce were concerned.

Under a separate heading, the Alexander Committee did consider the problems of consolidation of control of the strictly domestic waterborne commerce of the United States, which under the cabotage laws must be served by United States-owned companies (46 U.S.C. § 883). However, the Committee did not recommend that Congress enact legislation respecting consolidations among such carriers. Noting that railroad control of water carriers was twice as prevalent as water carrier consolidation, the Committee concluded that the Panama Canal Act of 1912 (37 Stat. 566, 49 U.S.C. § 5(14)-(16))¹⁵ went "far toward eliminating some of the undesirable practices which were found by the Committee to exist in the domestic commerce of the United States." (*Id.* at 409, 422.)

It seems reasonable to conclude that Congress was satisfied that existing law was adequate to deal with the problems of steamship company mergers and that it would be imprudent to grant the Commission merger jurisdiction, with its attendant antitrust immunity. If Congress had intended to grant merger jurisdiction over United States-owned steamship companies only, and other kinds of jurisdiction over foreign steamship companies, some

15. Section 11 of the Panama Canal Act made unlawful the control of any common carrier by water by railroads which the I.C.C. finds controls, reduces or prevents competition on any given route by water, and it also denied the use of the Panama Canal to any domestic or foreign trade water carrier found by any competent court to be operating in violation of the Sherman Act or acts supplementary thereto.

specific reference to the duality of regulation surely would have been included in the statute.¹⁶

2. The 1961 Amendments.

The legislative history of the 1961 amendments to Section 15 confirms the foregoing analysis and demonstrates that Congress then regarded Section 15 as extending only to continuing working arrangements. Inasmuch as the first paragraph of Section 15 was reenacted in 1961, the construction placed upon it by Congress at that time is entitled to great weight. *Federal Housing Authority v. Darlington*, 358 U.S. 84, 90 (1958); *Clark v. Uebersee Finanz Korp.*, 332 U.S. 480, 489 (1947).

Public Law 87-346 (75 Stat. 763-64) added, among others, two provisions which appear as the last sentence of paragraph two and paragraph three of the amended Section 15.¹⁷ Both of these provisions deal with conference arrangements, requiring a right of independent action under inter-conference agreements, freedom of withdrawal from conferences, and policing and shipper grievance machinery. It is significant that the language introducing these new provisions, relating to conference arrangements, refers back to paragraph one in each instance by use of "such agreement."¹⁸ This scheme in the amendatory language confirms that the Congress intended in 1961 to enact, as amended, a statute that deals

16. According to the Commission, "the same considerations which led Congress to grant this Commission the power to exempt anticompetitive rate fixing and pooling agreements from the strictures of the antitrust laws, would apply to a grant of the same power over agreements among domestic carriers to merge" (R.D. 36, p. 8). As we hope is apparent from the discussion above, the answer to this assertion is clear. Regulation of pooling and rate fixing agreements of *all* carriers serving this nation's foreign commerce was significant, but the regulation of mergers among only the United States-owned carriers serving such commerce was not. Moreover, Congress specifically extended Section 15 jurisdiction to pooling and rate fixing agreements but did not expressly extend that jurisdiction to merger agreements.

17. See Appendix A.

18. "No such agreement shall be approved The Commission shall disapprove any such agreement"

with agreements and arrangements of a continuing nature, a scheme which does not include mergers or merger agreements, as such.

The House report transmitting H.R. 6775 summarized the first paragraph of Section 15 as follows:

"It requires the filing with Board of all agreements . . . affecting, fixing, or regulating transportation rates or fares; *regulating competition*, pooling or apportioning earnings or traffic; specifying ports or otherwise regulating number and character of sailings between ports; affecting the volume of freight or passenger traffic to be carried; or providing in any manner for exclusive or cooperative working arrangements." (H.R. REP. NO. 498, 87th Cong., 1st Sess. 9 (1961), emphasis ours.)

Thus, the term "regulating competition" was regarded as the equivalent of "controlling, regulating, preventing, or destroying competition."¹⁹ Needless to say, a merger could hardly be regarded as an agreement regulating competition.

On the floor of the Senate there was considerable discussion of the purpose of Section 15, and the view was reiterated that Government control of the international shipping community's "working agreements" was the only practicable way to prevent destructive rate wars and shipping monopolies. Senator Engle, floor manager of the bill, stated the history of regulation under Section 15, in part, as follows:

"In 1906 the royal commission, designated by the King of England, made a study of conference arrangements for the

19. Cf. *Volkswagenwerk A.G. v. FMC*, 36 U.S.L.W. 4197, 4201 at n. 23 (U.S. March 6, 1968) where the Supreme Court recently stated as to the first paragraph of Section 15:

"Section 15 requires filing of 'every agreement' in any of seven categories, and one of the seven comprises all agreements which 'regulat(e) . . . competition.'" (Omission the Court's).

See also *Congress and the Monopoly Problem—Fifty-Six Years of Anti-Trust Development, 1900-1956, History of Congressional Action in the Anti-Trust Field since 1900*, H.R. Doc. No. 240, 85th Cong., 1st Sess. 28 (1957) (Approval of "cooperative working arrangements" by the Maritime Commission exempts them from the antitrust laws).

purpose of determining whether or not the conference systems were detrimental to the commerce of the British Isles. . . . The commission came to the conclusion that . . . the alternative [to a conference system] was trade wars. . . . *The big companies would eat up the little ones, and in the end there would be bigger monopoly systems than ever.*

"The Alexander committee in the House of Representatives . . . came to identically the same conclusion; namely, that a conference system was essential to the life of the merchant marine and the stability of the merchant marine throughout the world." (107 CONG. REC. 18239 (1961), emphasis ours.)

Senator Schoeppel, who supported the bill, emphasized the problems of regulating the international shipping community:

"The problem we face today is the basic conflict between our traditional antitrust principles and the cartel concept which guides steamship conferences.

"In resolving this conflict, it is essential to bear in mind that the regulation of international shipping is difficult, if not impossible, for any single government to achieve. The foreign commerce of the United States is also the foreign commerce of another nation. At best we could control only one end of the journey, and even then only a minority of the carriers are U.S. citizens or U.S. firms. . . . [R]ate wars lead to monopoly or to the exposure of American shippers and lines to disastrous competition with foreign shippers and lines. Peace is possible only through the use of conference arrangements and agreements. . . .

"In the face of these facts, U.S. law for 45 years has exempted steamship conferences from the antitrust laws and substituted instead the restraint of Government regulation specifically designed to take into account the international character of the industry. This bill is based on that approach. . . ." (107 CONG. REC. 18241 (1961).)²⁰

20. Senator Schoeppel also noted that the State Department's analysis of the difficulties of controlling foreign carriers in foreign trade compelled the conclusion that competition among all U.S. foreign commerce carriers could only be effectively controlled by the regulation of conference arrangements and agreements.

The bill was enacted in the form advocated by its Senate proponents. This discussion on the Senate floor confirms and clarifies the Alexander Report recommendations. It shows the intent of Section 15 is to head off the concentration of power in the industry by regulating working arrangements among existing companies, rather than seeking to regulate mergers as such among them.

3. The Amendments to Section 7 of the Clayton Act.

Having failed to find any support for its position in the legislative history of Section 15, the Commission has strayed further afield. It finds in the 1950 amendments to Section 7 of the Clayton Act evidence that mergers approved by the Commission were to be immunized from the antitrust laws. The final paragraph of Section 7 of the Clayton Act, as amended in 1950 (15 U.S.C. § 18), provides that Section 7 shall not apply to transactions authorized by the Commission, among other agencies, "under any statutory provision vesting such power."

The Commission's decision sets forth a letter written in 1950 by the Vice Chairman of the United States Maritime Commission to the Senate Subcommittee then considering the proposed amendments to Section 7 of the Clayton Act (R.D. 36, p. 15). That letter expressly refers to Section 15 and the provisions of H.R. 2734, amending Section 7, but made no contention that Section 15 encompasses transactions within Section 7 of the Clayton Act.²¹ Although Congress included the Commission in the provisions of the last paragraph of Section 7, the legislative history makes clear, as the Commission's decision acknowledges (R.D. 36, p. 16), that "in making this addition, however, it is not intended that the Maritime Commission, or, for that matter, any other agency included in this category, shall be granted any authority or powers which it does not already possess." (S. REP. NO. 1775, 81st Cong., 2d Sess. 7 (1950).)

21. The Commission overstates the contents of this letter (R.D. 36, p. 16), which is set forth in full in the decision (R.D. 36, p. 15 at n. 10) and speaks for itself.

It seems obvious from this disclaimer that Congress did not in 1950 undertake to determine the extent of powers possessed by any of the regulatory agencies, but in the interests of accommodation, any agencies that could arguably assert a conflicting jurisdiction were listed in the exclusion. Congress had no obligation to determine what the precise jurisdiction of each of the agencies concerned might be.

On at least two occasions the Supreme Court has squarely rejected the contention that inclusion in the last paragraph of Section 7 of the Clayton Act was a confirmation of merger jurisdiction or authority to immunize mergers in the agencies there enumerated. In *Milk Producers Ass'n. v. United States*, 362 U.S. 458 (1960), the Supreme Court held that the Secretary of Agriculture's power to approve agricultural marketing agreements did not extend to mergers, and the listing of the Secretary of Agriculture in the last paragraph of Section 7 was not regarded by the Court as a congressional recognition of merger authority in the Secretary. In *California v. Federal Power Commission*, 369 U.S. 482 (1962), the Court held that the Commission lacked authority to immunize mergers from the antitrust laws and specifically rejected the contention that enumeration of the Federal Power Commission (FPC) in the last paragraph of Section 7 of the Clayton Act manifested a recognition by Congress of such merger immunizing jurisdiction, stating as follows:

"The words 'transactions duly consummated pursuant to authority' given the Commission 'under any statutory provision vesting such power' in it are plainly not a grant of power to adjudicate antitrust issues. Congress made clear that by this proviso in § 7 of the Clayton Act '. . . it is not intended that . . . any . . . agency' mentioned 'shall be granted any authority or powers which it does not already possess' " (369 U.S. at 486).

The FPC had been given express authority to approve or deny the right of a natural gas company to "acquire . . . facilities or extensions thereof" in Section 7 of the Natural Gas Act (15 U.S.C. § 717f(c)). Thus, wholly unlike the present case, the

FPC had express authority to approve the asset acquisition which was before it, denominated by the Court as a "merger" (e.g. 369 U.S. at 484). But the asset acquisition had been preceded by a stock acquisition, and a Government antitrust suit challenging the stock acquisition was pending. The Court said that if the Commission were permitted to treat "the entire relation of the companies—from the acquisition of the stock to the merger—as an integrated transaction . . . the Commission would be allowed to do by indirection what it has no jurisdiction to do directly" (369 U.S. at 490). Hence, the Court held that the FPC should defer to the pending antitrust proceeding, among other reasons, *because its approval nevertheless would not confer antitrust immunity*.

The Commission seeks to distinguish both cases: *Milk Producers* on the ground that the Secretary of Agriculture is not authorized to approve mergers but the Commission is;²² and *California* on the ground that the FPC is not authorized to immunize mergers from the antitrust laws but the Commission is (R.D. 36, p. 17). We doubt that this Court will be impressed with that kind of boot strap argument. The point at issue is whether Section 15 confers merger authority on the Commission. It is clear from *Milk Producers* and *California* that Section 7 of the Clayton Act is not a recognition of such authority. Hence, the Commission's claim to merger jurisdiction is not advanced by reference to the 1950 amendment to Section 7.

4. The AEIL Case and Advices to Congress.

The Commission also finds support in various communications between the Commission and Congress respecting the Commission's decision in the *AEIL* case.²³ In that case the Commission

22. The attempt to stretch "agreements' jurisdiction to encompass a merger embodied in an agreement was specifically disapproved in the *Milk Producers* case, yet it serves as the Commission's premise for distinguishing *Milk Producers* from this case.

23. Agreement No. 8555 between Isbrandtsen Steamship Co., Inc., Isbrandtsen Co., Inc. and American Export Lines, Inc., 7 F.M.C. 125 (1962).

approved pursuant to Section 15 an agreement between competing companies for the sale of steamship assets that contained a covenant not to compete on the part of the seller. The covenant not to compete was clearly subject to Section 15, but it is far from clear whether the decision purported to approve the acquisition of assets. In any event, the decision does not contain any reasoned discussion of the problems presented by the Commission's exercise of merger jurisdiction, and the Commission's decision below in this case was therefore essentially a case of first impression.²⁴

The Commission, however, treated the *AEIL* case as a favorable merger precedent, and referred to a report to the Celler Committee by former Commission Chairman Stakem to the effect that the *AEIL* case "constitutes notice that merger agreements must be filed with the Commission" (R.D. 36, p. 18). Unfortunately, the Commission misquoted Chairman Stakem's report. Furthermore, it is perfectly clear from Chairman Stakem's testimony before the Committee that he regarded the Commission's jurisdiction as extending only to merger agreements containing covenants not to compete.²⁵ Indeed, the Commission concedes as

24. See Agreements No. 8745 and 8745-1, 7 F.M.C. 199, 200 (1962), where the *AEIL* case is cited as jurisdictional authority for approval of a covenant not to compete contained in a steamship sales agreement between two companies not shown to have previously been in competition.

In the briefs before the Commission both sides pointed to various other Commission decisions in arguably analagous cases as either supporting or not supporting Commission jurisdiction over mergers. None addressed itself to the questions here presented, and none in our opinion warrant consideration by this Court.

25. The pertinent part of the testimony is as follows:

"Mr. Appel: . . . My question reduces itself to this: Are shipping lines to be on notice that if they desire to merge, they must submit the proposal under Section 15 of the Act?

"Mr. Stakem: I think certainly if the plan calls for a noncompete or has noncompete clauses in it, that it falls within the sphere that this Commission should look at." (*Progress Report—Federal Maritime Commission*, Hearing before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 2d Sess. 22 (1962).)

Later, Chairman Stakem submitted the statement misquoted by the Commission, which can only be interpreted as considering an express covenant

much at an earlier point in its decision (R.D. 36, p. 13, n. 9).²⁶ Significantly, and in contrast with the Alexander Committee experience, the Celler Committee uncovered a trend toward ownership concentration among United States-owned foreign commerce carriers, and it believed the agency principally concerned was the Department of Justice.²⁷

D. IMPLIED REPEAL OF THE ANTITRUST LAWS IS NOT FAVORED.

The principal consequence of granting Section 15 approval of a merger is to immunize that merger from the antitrust laws. The Commission recognizes that this would be the consequence, but is undaunted by the numerous decisions holding that the repeal of the antitrust laws by implication is not favored.

In a long line of decisions reaching back over at least the last twenty-five years, the Supreme Court has held, with ever-

not to compete, or some other working arrangement, as essential to Section 15 jurisdiction over agreements pertaining to merger:

"I believe that Section 15 and our decision in the Isbrandtsen-Export Merger case constitute notice that *merger agreements* between common carriers subject to the Shipping Act, 1916, *which control, regulate, prevent, or destroy competition or in any way provide for exclusive, preferential, or cooperative working arrangements*, must be filed with the Commission. . . ." (Id. at 23, emphasis ours.)

26. We cannot understand by what reasoning the Commission can consistently conclude that Chairman Stakem's statement before the Celler Committee "shows only what a single member of the Commission may have felt in casting his vote" (R.D. 36, p. 13, n. 9), but Chairman's Stakem's statements, nevertheless, reflect the Commission's position that merger agreements are within its jurisdiction (R.D. 36, pp. 17-18), and a previous Vice Chairman's letter to a congressional committee in 1950 also represented the views of the entire Commission (R.D. 36, pp. 15-16). The only consistency is that the Commission's decision adopts what supports and rejects what detracts from its ultimate conclusion.

27. In its report, on the "Ocean Freight Industry" the Celler Committee, with the "Natomas group" and the AEIL combination specifically in mind, recommended "as a minimum program looking toward the reversal of this trend" of declining U.S. merchant shipping:

"(3) A study be undertaken by the Department of Justice in conjunction with the maritime agencies to determine whether control of U.S.-flag vessels and lines is becoming too highly concentrated for the best interests of the United States and, if so, what steps should be taken to correct the situation." (H.R. REP. No. 1419, 87th Cong. 2d Sess. 46-48, 83 (1962).)

increasing regularity, that the repeal of the antitrust laws by a regulatory statute will be implied only if necessary to give effect to the regulatory scheme; and the Court has repeatedly construed regulatory statutes narrowly in order to give full effect to the antitrust laws.²⁸ This has been particularly true in instances where regulatory agencies have asserted jurisdiction respecting mergers.

In *Milk Producers Association v. United States*, 362 U.S. 458 (1960), the Court held that authority granted to the Secretary of Agriculture by Section 8b of the Agricultural Adjustment Act (7 U.S.C. § 608b) to approve agricultural marketing agreements and to exempt them from the antitrust laws did not extend to an agreement to acquire the total assets of a retail outlet.

In *California v. Federal Power Commission*, 369 U.S. 482 (1962), the Court narrowly construed Section 7 of the Natural Gas Act to preserve the antitrust jurisdiction of the federal district courts over mergers of natural gas pipeline companies (pp. 23-24, *supra*). Referring to its decision in the *Milk Producers* case, the Court observed that "immunity from the antitrust laws is not lightly implied" (369 U.S. at 485).

In *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), the Court held that approval of a merger by the Comptroller of Currency pursuant to the Bank Merger Act (12 U.S.C. § 1828) did not clothe the merger with immunity from Section 7 of the Clayton Act. This conclusion was reached in spite of considerable legislative history which tended to establish that Congress at the time of enactment of the Bank Merger Act had thought Section 7 to be inapplicable to bank mergers, and had

28. *United States v. Third National Bank in Nashville*, 36 U.S.L.W. 4178 (U.S. March 4, 1968); *Denver & Rio Grande Western R. Co. v. United States*, 387 U.S. 485 (1967); *United States v. First City National Bank*, 386 U.S. 371, (1967); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217-18 (1966); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-52 (1963); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963); *California v. Federal Power Commission*, 369 U.S. 482, 485 (1962); *Milk Producers Ass'n. v. United States*, 362 U.S. 458, 469-70 (1960); *United States v. RCA*, 358 U.S. 334, 346-52 (1959); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-57 (1945); *United States v. Borden*, 308 U.S. 188, 198-201 (1939).

therefore authorized the Comptroller of Currency to consider competitive factors before approving mergers. The Court reiterated its strong disinclination to imply repeal of the antitrust laws:

“Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.” (374 U.S. at 350-51.)

In the recent case of *Denver & Rio Grande Western R. Co. v. United States*, 387 U.S. 485 (1967), the Court held a new stock issue that is the “first step” in a control acquisition must be appraised by the ICC under the strict test of Section 7 of the Clayton Act, even though a control acquisition would be entitled to immunity from Section 7 under the less rigid test of Section 5 (2) of the Interstate Commerce Act.

In *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), the Court held that the Commission’s jurisdiction to approve Section 15 agreements and immunize them from the antitrust laws did not displace the antitrust laws respecting unfilled Section 15 agreements. The decision emphatically rejected the argument, seemingly supported by earlier decisions of the Court,²⁹ that Section 15 effected a *pro tanto* repeal of the antitrust laws respecting all matters within its purview. On the contrary, the Court held that Section 15 is to be strictly construed.

“We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry. We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws. . . .

29. *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932); *Far East Conference v. United States*, 342 U.S. 570 (1952). The thrust of those decisions as previously understood was in our opinion correctly reflected by the decision of this Court in *Carnation* (336 F.2d 650), which was reversed by the Supreme Court.

"The historical background of the Shipping Act does not indicate that a different rule of construction should be applied in interpreting that Act. The Congress which enacted the Shipping Act was not hostile to antitrust regulation. On the contrary, the Shipping Act was the end product of an extensive investigation of the shipping industry that was conducted by the Congress which enacted the Clayton Act.

"

"[I]t seems likely that the [Alexander] Committee really only wanted to give the shipping industry a limited antitrust exemption. We do not believe that its purpose would be frustrated by the application of the antitrust laws to the implementation of [unfiled] conference agreements. . . .

"But even if the Committee considered the possibility of a complete antitrust exemption . . . those who drafted the Shipping Act during the next Congress decided not to give the industry complete antitrust immunity." (383 U.S. at 218-20.)

We are aware of no case in which the language of a regulatory statute has been broadly construed to give antitrust immunity in areas not expressly covered by an antitrust exemption. Only where the alleged antitrust violation has comprised the "precise ingredients" of a matter respecting which the agency has express jurisdiction to grant antitrust immunity has a repugnancy between the antitrust laws and the regulatory statute, and subordination of the former, been found. *Pan American World Airways v. Civil Aeronautics Board*, 371 U.S. 296, 305 (1963).³⁰

30. The Court's recent decision in *Volkswagenwerk A.G. v. Federal Maritime Commission*, 36 U.S.L.W. 4197 (U.S. March 6, 1968), is also such a case. *Volkswagen* involved investigation of an agreement among common carriers and other persons subject to the Act to assess cargo with an additional charge represented by an aliquot portion of payments to be made by the carriers into a mechanization fund established pursuant to a collective bargaining agreement between an association of carriers and a labor union. The Commission, perhaps motivated in part by the labor negotiation overtones, held the agreement did not affect competition and was therefore not subject to its Section 15 jurisdiction. The Court reversed, holding that the agreement was quite clearly a "cooperative working arrangement" within the meaning of Section 15. The Court said the

E. OTHER REGULATORY AGENCIES WITH POWER TO AUTHORIZE MERGERS AND IMPART ANTITRUST IMMUNITY HAVE BEEN GRANTED EXPRESS MERGER AUTHORITY WITH SPECIFIC STATUTORY STANDARDS AS WELL AS POWER TO DISSOLVE MERGERS.

In the instances where Congress has wished a regulatory agency to exercise jurisdiction over mergers and to provide antitrust immunity, it has done so in clear and specific language. The Interstate Commerce Commission (ICC), the Civil Aeronautics Board (CAB) and the Federal Communications Commission (FCC) are each authorized in clear and unambiguous language to approve the acquisition of one regulated carrier by another, by statutory merger, stock acquisition, consolidation or otherwise. In addition, the CAB and the ICC are each given authority respecting cooperative working arrangements of various kinds between carriers in separate sections of their governing statutes. Comparison of these regulatory schemes with that provided by Section 15 gives rise to the strong inference that Congress would have specifically granted merger jurisdiction had it intended for this Commission to exercise it.

1. Specific Grants of Merger Authority.

The first of these explicit statutes conferring power to adjudicate and validate mergers was passed in 1920 as a reaction to two Supreme Court decisions which had applied the Sherman Act to railroad mergers.³¹ Accordingly, the Transportation Act of 1920 (41 Stat. 481) revised old Section 5 of the Interstate Commerce Act (ICA). New Section 5 (1) of the ICA specifically legalized contracts, agreements or combinations among carriers for the pooling or division of traffic or earnings when approved by the ICC. New Sections 5(2) and 5(6) expressly conferred

Commission, in limiting Section 15 to cooperative working agreements that "affect competition" and in holding that the assessment agreement did not "affect competition", used that phrase in a "highly artificial sense" and took "an extremely narrow view" of Section 15 (36 U.S.L.W. at 4200). Thus, there, as in this case, the Commission had placed too much emphasis on the "controlling, regulating, preventing or destroying competition" clause without due regard to the overall structure of the statute.

31. *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); *United States v. Union Pacific R. Co.*, 226 U.S. 61 (1912). See also *United States v. Southern Pacific Co.*, 259 U.S. 214 (1922) (applying pre-1920 law).

authority on the Commission to approve acquisition of "control" of one carrier over another or "consolidation" of two or more carriers under common ownership (41 Stat. 481-82). Section 5(8) of the 1920 Act then exempted any carrier "affected by an order under this section [5] and any corporation organized to effect a consolidation approved and authorized in such order" from the antitrust laws "insofar as may be necessary to enable them to do anything authorized or required by any [such] order. . . ." (41 Stat. 482.)³²

Section 412 of the Federal Aviation Act (FAA) (formerly the Civil Aeronautics Act — CAA) (49 U.S.C. § 1382) authorizes the CAB to approve and exempt from the antitrust laws under Section 414 (49 U.S.C. § 1384) cooperative working agreements of various kinds.³³ The section, originally enacted in 1938, is virtually identical to and was patterned after Section 15 of the Shipping Act. *McManus v. CAB*, 286 F.2d 414 (2d Cir. 1961); *Mediterranean Pools Investigation*, 9 F.M.C. 264, 290 at n. 13 (1966). Both sections are obviously limited to working arrangements.

In addition to jurisdiction over cooperative working arrangements, Congress wished the CAB to exercise jurisdiction over

32. In 1933 Congress further amended Section 5 of the Interstate Commerce Act to consolidate the provisions of old Sections 5(2) and 5(6) under a new Section 5(4) with common standards for approval and to provide additional authorization for ICC approval of non-carrier control of two or more carriers by stock ownership. Old Section 5(8) was continued as Section 5(15). (48 Stat. 217.) Then in 1940, Sections 5(1), 5(2) and 5(11) were enacted substantially in their present form (54 Stat. 904).

33. Section 412 of the Federal Aviation Act (49 U.S.C. § 1382) provides, in part, as follows:

"Every carrier shall file . . . every contract or agreement . . . affecting air transportation . . . for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements." (Emphasis ours.)

mergers of airlines. Consequently, also in 1938 it adopted Section 408 of the CAA (now the FAA) (49 U.S.C. § 1378) specifically and in detail conferring jurisdiction to approve mergers, which were also exempted under Section 414 from the antitrust laws. If Section 412 had been thought by Congress to confer jurisdiction over mergers, it would have been needless for Congress to have enacted Section 408 specifically conferring such jurisdiction.

As in the case of the merger approval provisions of the ICA and the FAA, Congress *specifically* vested jurisdiction in the FCC to approve consolidations and acquisitions among telephone companies for the effectuation of control by one such company over another.³⁴ It also granted the FCC specific authority to approve consolidations or mergers among *domestic* telegraph carriers.³⁵ In both provisions the approved transactions are automatically exempted from the antitrust laws.

The Commission found a chronological analysis of statutory development to be a persuasive explanation for the lack of specific merger authority in Section 15, and the presence of specific merger authority in the other regulatory statutes discussed above (R. D. 36, pp. 9-10). The Commission asserts that the differences in statutory language would be significant only if Section 15 had been adopted by Congress subsequent to the adoption of the other analogous regulatory provisions; however, since Section 15 was adopted *prior* to the other provisions, no significance is to be attached to the differences in language. The subsequent specificity in other statutes is chalked up by the Commission as a "later stylistic preference in legislative draftsmanship" (R. D. 36, p. 10).

This analysis must be based on the premise that the successive Congresses became more sophisticated in the use of language and

34. Federal Communications Act of 1934, 48 Stat. 1080 (47 U.S.C. § 221).

35. Act of March 6, 1943, 57 Stat. 5 (47 U.S.C. § 222). This enactment's specific reference to "domestic" carriers underscores the point made previously that Congress would not have granted a limited merger jurisdiction to the Maritime Commission over United States-owned steamship companies only without specifically so stating.

that a good deal was learned about the art of draftsmanship in the four years that elapsed between enactment of the Shipping Act and enactment of the specific railroad merger provisions of the ICA.³⁶ Otherwise, it might equally be said that had Section 15 been adopted subsequent to the other provisions, it was merely a stylistic preference *for that Congress not to spell out merger jurisdiction specifically*.

Whatever might otherwise be said for this kind of chronological analysis, it breaks down entirely, it seems to us, in the light of the fact that Congress in 1914 adopted the Clayton Act, in which it specifically dealt with corporate consolidations of the kind then thought most prevalent by Congress, to wit, through stock acquisitions tending substantially to lessen competition. Thus, the language for dealing with corporate control through consolidation of ownership was available had Congress chosen to use it. While Section 7 was later held by the courts not to apply to asset acquisitions and statutory mergers, this hardly supports the position of the Commission. If the courts were unwilling to read the language of Section 7 as encompassing any form of corporate consolidations other than those specifically provided for, they could hardly be expected to read the general language of Section 15 as incorporating corporate consolidations and mergers.

Another weakness in the Commission's chronological analysis arises from the fact, already noted, that Congress very substantially amended Section 15 in 1961, at which time the first paragraph was re-enacted. It can hardly be said that the 1961 Congress was unfamiliar with the "stylistic preference in legislative draftsmanship" manifested by the earlier Congress of conferring merger jurisdiction on regulatory agencies in specific terms. In the light of that background, it would be anomalous, it seems to us, for a court to hold that while Section 412 of the FAA

36. The Commission stresses that Section 5b of the ICA, "the section which is now comparable to Section 15," was not enacted until 1948, but ignores the fact that the Transportation Act of 1920 extended ICC jurisdiction to pooling agreements of various kinds and specifically to railroad mergers (see discussion at pp. 30-31, *supra*).

applies only to cooperative working arrangements, Section 15, upon which Section 412 was patterned and which was re-enacted subsequent to Section 412, extends to agreements for all forms of corporate consolidation as well.³⁷

2. Specific Grants of Merger Standards.

Another reason for not construing Section 15 as encompassing mergers is the complete absence therefrom of specific standards for approval of mergers. The "public interest" standard, which was not added until 1961, provides the most obvious general test. In contrast, Section 15 contains rather detailed standards respecting continuing agreements among carriers. The inadequacy of the language of Section 15 for dealing with mergers becomes evident when compared with the requirements and standards of other regulatory statutes which do contemplate the exercise of merger jurisdiction by those agencies.

Section 5(2) of the ICA enumerates in some detail the kind of corporate combinations which may be approved, and the procedural steps for obtaining approval are also spelled out in some detail. The factors that the ICC is specifically directed to consider in determining whether to approve a merger include (a) the effect of the proposed transaction on adequate transportation service, (b) the effect on the public interest of including or not including other carriers in the merger, (c) the nature of the total dividends or fixed charges resulting from the proposed transaction, (d) the interest of the carrier employees affected

37. And see *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456 (1945), where the Court held that section 5(1) of the ICA could not be read to include authorization for the ICC to approve and exempt from the antitrust laws agreements among carriers regulating rates. It was necessary for Congress to enact *specific* legislation authorizing ICC jurisdiction over such agreements in 1948 (62 Stat. 472, 49 U.S.C. § 5b). However, even Section 5b has been strictly construed against ICC jurisdiction. *Riss & Co. v. Association of American Railroads*, 170 F. Supp. 354 (D. D.C. 1959) *certiorari denied sub nom Atlantic Coast Line R. Co. v. Riss & Co.*, 361 U.S. 804 (1959).

The Congress that enacted Section 5b also noted that it was patterned after "the provisions of Section 15 of the Shipping Act, 1916...with respect to contracts between common carriers by water subject to that Act," H.R. REP. NO. 1100, 80th Cong., 2d Sess. (1948), 2 U.S. Code Cong. Service, 1844, 1848 (1948).

(49 U.S.C. § 5 (2) (c)-(f)),³⁸ and the rather extensive “public interest” criteria set forth in the National Transportation Policy of the ICA (49 U.S.C. preceding § 1).

Similarly, the FCC (47 U.S.C. § 222) and the CAB (49 U.S.C. § 1378) are both guided by specific statutory standards addressed to the question of determining whether to grant approval to mergers.³⁹ Both the ICC and the CAB have separate standards for guidance in approving cooperative working arrangements of the type contemplated in Section 15.⁴⁰

The complete inadequacy of guidelines addressed to consideration of the approval or disapproval of mergers under Section 15 is exemplified by the Commission’s decision on the merits in this very case and the dissenting opinions of Commissioners Hearn and Day. According to Commissioner Day, “the majority is guessing at guidelines” (R.D. 36, p. 29), and Commissioner Hearn includes in his two opinions a considerable enumeration of matters that were not considered by the Commission, including the effect of the merger upon Government investment through subsidy payments made to the merging lines, the effect of the merger upon the shipping public and the merger applicants’ employees, the effect of the merger upon the future fleet development and operations of the three companies, as well as many others (R.D. 36, pp. 26-27; R.D. 43, pp. 52-54). The Commission did not even have before it the corporate form that the merger is to take, for these matters had not yet been determined by the merger applicants. The inadequacies of the

38. Although these specific criteria were not added until 1940, prior to that time the ICC was charged with the duty of formulating a master plan to *compel* mergers among railroads. See Penn-Central Merger Cases, 389 U.S. 486, 492-93 (1968). This is clearly not the assignment given to the Commission in 1916 or 1961.

39. In response to President Kennedy’s message to Congress (1962 U.S. Code Cong. Admin. News 4148, 4153-54), an inter-agency committee was established to prescribe additional criteria that the CAB and ICC might utilize in merger cases, and a release specifying these additional criteria was later issued (109 CONG. REC. 3671-73 (1963)).

40. 49 U.S.C. §§ 5(1), 5b; 49 U.S.C. § 1382.

Commission's decision in this regard are discussed in greater detail at pp. 68-73, *infra*.

3. Specific Authority to Order Divestiture.

Finally, it is important to note that the ICC, CAB, and FCC are each specifically authorized under Section 11 of the Clayton Act to institute a proceeding for enforcement of Section 7 of the Clayton Act and to issue orders, among other things, requiring respondent in such proceedings to "divest itself of the stock, or other share capital, or assets, . . . in the manner and within the time fixed by said order" (15 U.S.C. § 21). Thus, if any of these three agencies should decide to approve a merger after full and proper hearing, it has a statutory basis upon which subsequently to order divestiture if post-transaction scrutiny warrants such action. The Commission's decision minimized its own lack of any such power, asserting that as a result of the Commission's "pre-transaction scrutiny . . . the need for orders of divestiture is substantially lessened if not eliminated" (R.D. 36, p. 12). Of course, the same could also be said respecting the pre-transaction scrutiny by each of the other three agencies, which, as we discuss below,⁴¹ is much more complete than the scrutiny the Commission indicates it will give to mergers.

The Supreme Court has already indicated the importance it attaches to the grant of jurisdiction contained in Section 11 of the Clayton Act. Thus, in *California v. Federal Power Commission, supra*, in holding that the Federal Power Commission lacked authority under Section 7 of the Natural Gas Act to immunize mergers from the antitrust laws, the Court emphasized that the Federal Power Commission was not enumerated in Section 11 of the Clayton Act as one of those agencies authorized to enforce compliance with Section 7 of the Clayton Act.

We think the inference to be drawn from the express congressional grant to each of the three sister agencies (CAB, ICC, FCC) to approve mergers under specific statutory guidelines and immunize them from the antitrust laws, as well as to enforce Section 7 of the Clayton Act, when coupled with the absence of

41. pp. 60, 63-64, 70-74, *infra*.

such express grants to the Commission, cannot be cast aside as a stylistic preference of Congress. We are confident the Supreme Court would not so regard it, for the Commission's authority is deficient in two of the areas which prompted the Court to conclude that the Federal Power Commission lacked authority to immunize mergers in *California v. Federal Power Commission, supra*: (a) No specific authority to exempt mergers from the antitrust laws, and (b) no power under Section 11 of the Clayton Act to enforce Section 7 of the Clayton Act.

F. EXERCISE OF THE COMMISSION'S ATTENUATED VERSION OF MERGER JURISDICTION WOULD BE CONTRARY TO SOUND PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST.

It cannot be emphasized too strongly that the Commission's view of its own jurisdiction over mergers is rent with enormous gaps. As we have already noted, the Commission construes its merger jurisdiction as extending only to mergers among United States-owned common carriers and other persons subject to the Act accomplished by agreement. We submit that exercise of such an attenuated merger jurisdiction would be patently contrary to the public interest.

It seems apparent that the exercise of jurisdiction over only limited types of mergers would leave the regulated companies free either to invoke the Commission's jurisdiction or not to do so in accordance with their own ends. If it seemed desirable to obtain antitrust immunity for a particular transaction, the parties could enter into an agreement and submit it to the Commission for its approval. If the transaction did not seem of sufficient consequence to run afoul of the antitrust laws, the parties could avoid the Commission's jurisdiction by omitting the agreement. It is difficult to see how the Commission could exercise a meaningful regulatory supervision over mergers if its jurisdiction were so easily avoided.

Indeed, the pattern of ownership represented by the applicants in this very case illustrates the point. Natomas Company, a company not subject to the jurisdiction of the Commission, has

acquired control of both APL and PFEL through purchase of the stock of both lines. APL in turn owns approximately 93% of the stock in AML (R. Ex. 2; Tr. 47-51). These interests were all acquired without any regulatory supervision from the Commission under Section 15 (R. Tr. 59-60). Further, the statutory merger of AML and APL could be brought about under Delaware law without any agreement between the two companies (R.D. 43, p. 42).

Not only does this gap in regulatory jurisdiction give the combining companies an option respecting invocation of the Commission's jurisdiction,⁴² but it apparently creates blind spots in the Commission's exercise of its jurisdiction when it is invoked. Thus, in this case, instead of regarding the prior acquisitions accomplished beyond its jurisdiction as matters to be viewed with grave concern, the Commission regarded them as diminishing the competitive consequences of the instant merger.⁴³ One can perhaps sympathize with the Commission for taking this approach, inasmuch as it is without power to do anything about the prior concentration accomplished beyond its regulatory guise. At the same time, the Commission has purported to immunize the entire corporate consolidation of these three companies from the antitrust laws. We submit that a scheme of regulation that could produce such a result can hardly be held up as a model of public administration. If Congress had created such a regulatory monstrosity by clear and unambiguous terms, that would be one thing. For the Commission to pattern it out of whole cloth is quite another.

42. See note 5, *supra*.

43. The Commission's observation in this regard was as follows (R.D. 43, p. 39):

"No substantial increase in economic concentration will result from the merger of APL and its 93%-owned subsidiary, AML. The concentration resulting from the merger of PFEL is somewhat diluted by the affiliation, through common ownership of stock, which has existed for more than ten years."

Compare Monarch-Challenger Merger Case, 11 C.A.B. 33, 34-35 (1949). (Stock acquisitions sufficient for merger and a subsequent merger must both be judged by the same standards under Section 408(b) of the FAA.)

Congress has been reasonably careful in extending its own grants of merger jurisdiction to regulatory agencies to see that such regulatory gaps do not exist. Thus, Section 5(2) of the ICA extends to the merger or consolidation by two or more carriers as well as to the acquisition of control of such carriers "through ownership of their stock or otherwise . . ." Section 408 of the FAA applies to "consolidation, merger, purchase, lease, operating contract or acquisition of control. . . ." Similarly, the jurisdiction granted to the FCC over mergers of domestic telephone and telegraph companies is all-pervasive in scope.⁴⁴ Further, there can be no doubt that Section 7 of the Clayton Act as now written extends to all forms of corporate acquisitions and consolidations, whether by stock or asset acquisition or otherwise.

The Commission recognizes its obligation to maintain regulatory impartiality as between United States flag and foreign flag companies (R. D. 36, pp. 8-9). Indeed, it was the asserted desirability of maintaining the Government's regulatory functions separate and apart from its promotional functions in the maritime field that prompted President Kennedy to recommend and the Congress to enact legislation establishing the Federal Maritime Commission separate from the Maritime Administration.⁴⁵ Yet, if the Commission is to exercise regulatory jurisdiction respecting the mergers of United States-owned steamship companies, it will inevitably view such mergers permissively lest its disapproval place the United States-owned companies at a disadvantage vis-a-vis their foreign flag competitors over whose mergers the

44. The Federal Communications Act, as amended, (47 USC § 222 (a)) provides in pertinent part as follows:

"The term 'consolidation or merger' includes the legal consolidation or merger of two or more corporations, and the acquisition by a corporation through purchase, lease or in any other manner, of the whole or any part of the property, securities, facilities, services, or business of any other corporation or corporations, or of the control thereof, in exchange for its own securities, or otherwise."

45. Reorganization plan No. 7 1961, 75 Stat. 841-843; Message from President John F. Kennedy to Congress, dated June 12, 1961, 107 CONG. REC. 9366, H.R. Doc. No. 187, 87th Cong., 1st Sess. (1961).

Commission exercises no jurisdiction. This particular syndrome is also manifested in the Commission's opinion on the merits. The Commission indicated that it regarded the recent merger of certain Japanese steamship companies, over which the Commission exercised no jurisdiction, as a factor favoring its grant of approval for the instant merger, stating as follows:

"United States-owned carriers in foreign commerce are part of the American economy but foreign-owned carriers are not. No application of our antitrust laws based upon our desire to avoid concentration in our economy could rationally be directed against foreign carriers; they are free to pursue the efficiencies of concentration without regard to that, as witness the recent mergers of Japanese carriers under Japanese government pressure if not compulsion. This must be considered in weighing the merger of U.S. flag carriers, which definitely are a part of the American economy and a substantial factor in our balance-of-payments position, since our carriers must compete directly with foreign carriers." (R.D. 43, pp. 39-40, footnotes omitted.)

We submit that the exercise of Commission jurisdiction over mergers and the application of the inevitable regulatory philosophy manifested in the above quotation could lead to the virtual elimination through merger of competition within the United States-owned steamship industry. Such a result would be inconsistent with the nation's antitrust policy, as well as the policy which underlay the adoption of Section 15 in the first instance.

II. If the Commission Has Merger Jurisdiction, Its Findings, Analysis and Determination of the Legal Issues Are Inadequate to Support Approval.

In this portion of the brief we assume for purposes of argument that the Commission does have jurisdiction pursuant to Section 15 to approve merger agreements and immunize them from the antitrust laws. We then ask: Must the Commission require a full disclosure of all merger plans, assess the ramifications and effects of the merger in all its aspects, including any

anticompetitive effects, and approve the merger only after finding that it is justified to meet an urgent transportation need or produce an important public benefit?

If this question correctly frames the Commission's duties, we submit that the Commission's decision is inadequate as a matter of law and cannot stand. Whether, on the basis of a supplemented record, findings and conclusions could be made to support the proposed merger is outside the scope of this brief.⁴⁶

This case involves a proposed, horizontal merger of competing carriers, and is anticompetitive on its face. The Commission's decision has found no transportation need or public benefit to be served by the merger and has not required the applicants to come forth with sufficient evidence to provide a proper basis for assessing the consequences of the merger. Indeed, the applicants' merger plans were insufficiently developed at the time of the hearing for them even to inform the Commission respecting such matters as the corporate form of the merger transaction and the effect of the merger on the applicants' financial relations with the Government under their operating differential subsidy contracts, on their fleet operations and development, or on a broad range of other matters bearing on the public interest.

The Commission's first decision and order recognized this deficiency, remanding the matter to the Examiner for additional evidence. In their petition for reconsideration, the merger applicants protested their inability to inform the Commission respecting many of these matters of fundamental importance "for months to come" and lamented that the order of remand was "probably . . . the practical equivalent of a decision disapproving the merger agreement" (R.D. 38, pp. 1, 5). The Commission then entered its second decision and order approving the merger with one of the three majority Commissioners concurring on the ground that

46. The Commission's decision erroneously asserts that "no exceptions were taken to the findings of fact upon which the Examiner based his conclusion to approve Agreement 9551" (R.D. 43, p. 2). Matson filed extensive exceptions to the findings of fact and conclusions reached in the initial decision (R.D. 29, pp. 1-4).

"the first Commission decision . . . would needlessly prolong the litigation" (R.D. 43, p. 45).

As we now demonstrate, the Commission has departed from its own standards for approvability of agreements under Section 15. Rather than applying a more rigorous standard to merger agreements, characterized by the Commission as "perhaps the most anticompetitive of them all" (R.D. 36, p. 6), the Commission has applied a more permissive standard than it applies to other agreements.

A. THE BURDEN WAS ON THE APPLICANTS TO PROVE AND THE COMMISSION AFFIRMATIVELY TO FIND THAT THE MERGER AGREEMENT WAS JUSTIFIED BY AN URGENT TRANSPORTATION NEED OR CONFERRAL OF AN IMPORTANT PUBLIC BENEFIT.

Section 15 provides that every agreement within its contemplation "shall" be filed with the Commission and that the Commission "shall . . . after notice and hearing, disapprove . . . any agreement . . . that it finds to be . . . unfair as between carriers . . . to operate to the detriment of the commerce of the United States . . . or to be contrary to the public interest. . . ." The section further provides that it is unlawful to carry out any agreement "before approval or after disapproval".

Matson contends that this language places the burden on the merger applicants to establish by a preponderance of the evidence that the merger is consistent with each of the statutory standards and, perhaps of greatest importance, is not contrary to the public interest. Further, the Commission may not approve a merger agreement unless the applicants establish and the Commission finds that the degree of foreclosure of competition that will be brought about thereby is justified to meet an urgent transportation need or to confer an important public benefit. This construction is consistent with Section 7(d) of the Administrative Procedure Act, which provides that the "proponent of a rule or order shall have the burden of proof" (5 U.S.C. § 556). It is also consistent with the Commission's own rule for the approvability of other types of anticompetitive agreements as specifically confirmed by the Supreme Court.

The test applied by the Commission under the public interest standard of Section 15 in appraising Section 15 agreements of all

kinds was elaborated by the Commission in its decision in *Mediterranean Pools Investigation*, 9 F.M.C. 264 (1966). The agreements there under consideration provided for the pooling of net freight revenues among member carriers of specific conferences. The Examiner's decision recommended approval of the agreements on the ground that there was not "an iota" of evidence controverting approval of the agreements and hence no finding could be made that the agreements were contrary to the public interest or the other tests specified in Section 15 (9 F.M.C. at 287). Although the Commission ultimately approved the agreements, it rejected the Examiner's test and emphasized the need for affirmative proof and findings that anticompetitive agreements were justified in the public interest.

After describing the historical context in which Congress had granted the Commission power to immunize anticompetitive agreements from the antitrust laws, the Commission emphasized the well-settled principle that the "'public interest' within the meaning of Section 15 includes the national policy embodied in the antitrust laws."⁴⁷ Hence, any anticompetitive agreement is presumptively contrary to the public interest until an appropriate justification is established by the applicant (9 F.M.C. at 290):

"[P]resumptively all anticompetitive combinations run counter to the public interest in free and open competition and it is incumbent upon those who seek exemption of anticompetitive combinations under section 15 to demonstrate that the combination seeks to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purposes of the Shipping Act."

Focusing upon the considerations which would justify the anticompetitive arrangement, the Commission in *Mediterranean Pools* declared that the burden of justification is met by showing that the proposed agreements "are *necessary* to produce important

47. 9 F.M.C. at 289. The Commission cited *Isbrandtsen Co. Inc. v. United States*, 211 F.2d 51 (D.C. Cir. 1954), *certiorari denied sub nom. Japanese Atlantic & Gulf Conference v. United States*, 347 U.S. 990 (1954). *Accord* *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 36 U.S.L.W. 4213 (U.S. March 6, 1968).

public benefits and are based on *a serious transportation need*" (9 F.M.C. at 292, emphasis ours). In that particular case these criteria were met by showing that the competition eliminated by the agreements is "destructive and wasteful and in itself tends to work hardship on shippers", that the agreements were aimed at "eliminating malpractices" in the trade, and that the agreements would "restore rate stability" to the trade. These factors were considered responsive to the "regulatory purposes of the Shipping Act" (9 F.M.C. at 292).

The Commission's explanation in *Mediterranean Pools* of the public interest standard under Section 15 was in full accord with nearly all other recent precedents under Section 15.⁴⁸ The only aberrations were two decisions of the Court of Appeals for the District of Columbia Circuit entered in the course of the so-called *Travel Agents Case*, and these two decisions have this Term been rejected by the Supreme Court, *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 36 U.S.L.W. 4213 (U.S. March 6, 1968). Inasmuch as the Supreme Court's decision in the *Travel Agents Case* was handed down subsequent to the Commission's decision below in this case, it is obviously of great importance here.

The *Travel Agents Case* commenced in 1959 with an investigation of certain practices of respondent steamship conferences regarding travel agents. The Commission's first decision⁴⁹ held

48. See, e.g., *Isbrandtsen Co., Inc. v. United States*, *supra*, note 47 at 57 (the Commission has the "duty to protect the public interest . . . to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute"); *Greater Baton Rouge Port Commission v. United States*, 287 F.2d 86, 94-95 (5th Cir. 1961) ("Efficiency is not enough. It is not a cure-all. . . . National policy favors free and healthy competition; monopoly is the exception"); *California Stevedore & Ballast Co. v. Stockton Port District*, 7 F.M.C. 75, 82 (1962) ("our national policy makes free competition the rule, and monopoly the exception which must be justified. . . ."); *Transshipment and Apportionment Agreements—Indonesia & U.S. Ports*, 10 F.M.C. 183, 196 (1966) ("we will not permit any greater invasion of the antitrust laws than is necessary to serve the public interest . . .").

49. *Investigation of Passenger Steamship Conference Regarding Travel Agents*, 7 F.M.C. 737 (1964).

that a conference "tying rule", which prohibited travel agents' booking passage on conference ships from doing so for competing non-conference ships, and a conference "unanimity rule", which required a unanimous vote of all conference members to authorize an increase in travel agents' commissions, should be eliminated from the conference agreement, which itself had been previously approved by the Commission. The court of appeals set aside the order and remanded the case to the Commission for more detailed findings.⁵⁰ The court stated that it did not "read the statute as authorizing disapproval of an agreement on the ground that it runs counter to antitrust principles, the theory on which seemingly the Commission's disapproval rests here" (351 F.2d at 761).

The Commission issued a further opinion on remand, in which it again disapproved the two rules on the ground that no adequate justification had been shown for their fundamental anti-competitive nature:⁵¹

"The parties seeking exemption from the antitrust laws for their agreement must demonstrate that the agreement is required by a serious transportation need, or in order to secure important public benefits. Otherwise, . . . it is our view that the public interest in the preservation of competition where possible, even in regulated industries, is unduly offended and the agreement is contrary to that interest within the meaning of Section 15."

The court of appeals reversed the Commission's order on the ground that it was not supported by substantial evidence.⁵² The Supreme Court reversed the court of appeals and expressly approved the Commission's statement of the "public interest" standard under Section 15:

50. *Aktiebolaget Svenska Amerika Linien v. Federal Maritime Commission*, 351 F.2d 756 (D.C. Cir. 1965).

51. *Investigation of Passenger Steamship Conferences Regarding Travel Agents*, 10 F.M.C. 27, 34-35 (1966).

52. *Aktiebolaget Svenska Amerika Linien v. Federal Maritime Commission*, 372 F.2d 932 (D.C. Cir. 1967).

"The Commission has formulated a rule that conference restraints which interfere with the policies of antitrust laws will be approved only if the conferences can 'bring forth such facts as would demonstrate that the . . . rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.'

* * * * *

"[O]nce an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest' unless other evidence in the record fairly detracts from the weight of this factor. . . . We therefore hold that the antitrust test formulated by the Commission is an appropriate refinement of the statutory 'public interest' standard." (36 U.S.L.W. at 4215.)

Unlike other types of Section 15 agreements, a merger agreement ends all present and potential competition between the parties, and the merger is irrevocable once consummated pursuant to the Commission's Section 15 approval. As we have already noted, the Commission itself concedes that merger agreements "are perhaps the most anticompetitive of them all" (R.D. 36, p. 6).

Although the nation's antitrust policies respecting various kinds of agreements subject to the Commission's jurisdiction may be in doubt, this is not the case with mergers. Section 7 of the Clayton Act clearly prohibits mergers of any kind when the effect thereof "may be substantially to lessen competition, or to tend to create a monopoly" (15 U.S.C. § 18). The decisions of the Supreme Court in recent years have made clear that any merger among relatively large companies in any line of commerce raises grave questions of legality under Section 7 of the Clayton Act.⁵³ Thus, the Commission has the obligation to be doubly vigilant to protect the standards of Section 15 in its exercise of merger jurisdiction, for "integration by merger is more

53. *United States v. Third National Bank in Nashville*, 36 U.S.L.W. 4178 (U.S. March 4, 1968); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Von Grocery Co.*, 384 U.S. 270,

suspect than integration by contract, because of the greater permanence of the former.” *United States v. Philadelphia National Bank*, 374 U.S. 321, 366 (1963). Having in mind that one of the fundamental purposes of Section 15 was to permit cooperative agreements among competing carriers so that the tendency to merge would be discouraged, it would seem ironic for the Commission to apply a less stringent standard of approvability to mergers than to cooperative agreements.

The status of the applicants in this case as operating-differential subsidy (ODS) contractors under Title VI of the Merchant Marine Act, 1936 (46 U.S.C. § 601 et seq.) provides a special reason for requiring a strong showing from the merger applicants that the proposed merger is in the public interest. Thus, the Maritime Administration, the agency responsible for administration of this nation’s subsidy program, has rejected a “chosen instrument” policy, whereby American flag subsidized competition *inter se* would be limited, and has held that competition between subsidized U. S. flag operators on this nation’s essential foreign trade routes is desirable. In *United States Lines—Subsidy, Route 12*, P.&F., 5 SRR 151 (MSB 1964), reversed and remanded in part, 5 SRR 671 (Secretary of Commerce, 1964), original decision reaffirmed, 5 SRR 969 (MSB 1965), the Board granted applications to three separate companies to provide new subsidized services on Trade Route 12 over objection of one of the applicants that competition among subsidized U. S. flag lines would be undesirable. The Board rejected that argument, stating, in part, as follows (5 SRR at 156-57):

“[I]f Section 605(c) was deemed a bar to the subsidization of the additional services by AEL and Waterman the effect would be to accord USL a veritable ‘chosen instrument’ position on Trade Route 12. We believe that an increase in U.S.-flag participation in this market can better be obtained through competition between U.S.-flag carriers which

277-78 (1966); *United States v. Aluminum Co. of America*, 377 U.S. 271, 280 (1964); *United States v. Philadelphia National Bank*, 374 U.S. 321, 365 at nn. 41-42 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 (1962).

invites comparison between equipment, sales effort, timing of sailings, and initiative of management, officers and crew.

"Unfortunately, the differential character of the operating subsidy program, while providing assistance to the carriers, does not appear to furnish a sufficient incentive for the U.S.-flag carriers to increase their participation in U.S. foreign commerce. It is our hope that the spur of intra-U.S. flag competition among rival managements and labor forces, each seeking to obtain a larger share of the trade for its company, will redound to the overall benefit of the Merchant Marine and the foreign commerce of the U.S."

Indeed, APL, one of the merger applicants in this case, opposed the grant of ODS to Pacific Transport Lines, Inc., the predecessor in interest of States Steamship Company, and to PFEL, one of the other applicants for merger in this case. APL contended that additional subsidized sailings on Trade Route 29 should be awarded to it rather than the competitive applicants if such additional service was warranted. The Board rejected this "chosen instrument" argument and the notion that "APL . . . has the primary responsibility for maintaining and developing the vast commerce on the route" and reaffirmed its authority and preference for "granting dual and multiple subsidies" on a given route. *Pacific Transport Lines, Inc. and Pacific Far East Line, Inc.—Subsidy, Route 29*, 4 F.M.B. 7, 17-18 (1952). Further, some five years later, all three of the merger applicants in this case unsuccessfully opposed the grant of an ODS contract to States, the only other subsidized U. S. flag line that will be left to provide substantial California-Far East competition with the merged company. *States Steamship Co.—Subsidy, Pacific Coast/Far East*, 5 F.M.B. 304, 307-08 (1957). Merger among these applicants would tend to nullify the policy that prompted the Maritime Administration's grant of subsidy to these separate companies in the first place.

Finally, a merger among competing companies quite obviously presents a whole range of problems that are not presented by the types of agreement customarily scrutinized by the Commis-

sion pursuant to Section 15. We have argued in Part I of this brief that the absence of any specific merger guidelines in Section 15 is strong evidence that the Commission is not to exercise merger jurisdiction. Nonetheless, the Commission and the merger applicants may not have it both ways. If the Commission is to exercise merger jurisdiction and confer antitrust immunity upon the merger, then it must consider and weigh all ramifications of the merger in determining whether it is contrary to the public interest. It may not ignore these other considerations on the ground they are not specified in the statute.

In this regard, the Commission might appropriately have considered the guidelines suggested by the Inter-Agency Committee on Transport Mergers appointed by President Kennedy in 1962. The criteria recommended by the Committee were intended primarily for exercise of the merger jurisdiction over the rail and air transport industries expressly conferred by the Interstate Commerce Act and Federal Aviation Act. However, the Committee did suggest that "these criteria have general applicability to mergers occurring in other modes of transport", though it recognized that "the particular character of one or more of these other modes may call for some modification of the criteria here set forth" (109 CONG. REC. 3671 (1963)). Among the criteria suggested by the Committee, which would obviously have applicability here, are the following:

"1. Will the proposed merger restrict effective competition in the provision of transportation services in the areas affected?

* * * * *

"4. Will the cost and quality benefits resulting from the merger be reflected in benefits to the public?

* * * * *

"6. Will the proposed merger serve the long-run interests of both the public and the carriers concerned, or is it merely an attempt to meet a short-run crisis arising either because of unfavorable economic conditions in general or a particular transitory problem?

"7. Is the merger proposed, in part, because of the imminent failure of one or more of the merging carriers, and is it the most appropriate solution to this difficulty?

* * * * *

"9. Does the merger provide adequate protection and assistance to affected employees, and take into account community employment effects?

"10. Will the proposed merger serve other objectives of public policy, including a reduction in public subsidies?" (Id.)

If the Commission is to give consideration to such criteria bearing on the public interest as those enumerated above, it is quite obviously incumbent upon the Commission to require that the merger applicants establish to the satisfaction of the Commission that the merger is fully justified in the light of these criteria.

B. THE COMMISSION ERRONEOUSLY ASSESSED THE STANDARDS APPLICABLE TO APPROVAL OF MERGERS.

At the outset of its discussion of the "Standards for Decision", the Commission suggests that the standards for approvability of Section 15 agreements elaborated in the *Mediterranean Pools* case, discussed above, are applicable only in the case of "an agreement that is on its face a per se violation of the antitrust laws," and hence that merger applicants need not establish that the merger is necessary to produce important public benefits or is based upon a serious transportation need (R.D. 43, p. 30). The Commission next asserts that while it "is not to measure proposed agreements by the standards of the antitrust laws," it may not "ignore their policy" (R.D. 43, p. 31).

There follows a discussion of Section 7 of the Clayton Act and the market analysis principles routinely applied for determining the probable effect of a merger (R.D. 43, pp. 31-43). The Commission concludes upon tentative application of these principles to the instant merger that, on the one hand, an aggregate market share of 26.1% of the liner cargo business in the Califor-

nia-Far East trade to be commanded by the merged company "represents a high degree of concentration"; but that, on the other hand, the 7.8% share of the "liner-plus-non-liner market" to be commanded by the merged company "gives no cause for concern. . . ." However, the Commission declines to say what it regards the relevant market to be on the ground that that question is "by no means controlling as to the public interest. . . ." (R.D. 43, p. 35.)

The Commission then enumerates essentially four factors which it believes mitigate the degree of concentration: (a) The "nature of the shipping industry"; (b) "the declining share of cargoes carried by U.S. flag vessels on TR 29"; (c) improvements in economy and efficiency that would result from the merger, a presumed merger benefit in the public interest for which the Commission finds support in cases under the Interstate Commerce Act; and (d) the existing degree of concentration among the three merger applicants (R.D. 43, pp. 38, 40, 41, 42). (We discuss (a) through (d) under Subsection 2 below.)

It is thus apparent that the Commission did not think it necessary to find the merger justified by an urgent transportation need or for the realization of an important public benefit. We shall now demonstrate that each of its stated reasons for not doing so is wrong.

1. The Commission's Asserted Basis for Applying a Less Rigorous Test to Mergers Cannot Stand.

a. The Commission's Per Se Antitrust Rule Is Wrong.

We think it apparent from our discussion under Section A above that the rule of the *Mediterranean Pools* and *Travel Agents* cases is, if anything, more clearly applicable to the agreement here under consideration than it is to any other kind of agreement. To the extent the Commission's suggestion that the rule does not apply to mergers is based upon the court of appeals' decision in the *Travel Agents* case (R.D. 43, p. 30), which has subsequent to the Commission's decision herein been reversed by the Supreme Court, it is obviously misplaced.

Nor is the Commission's position aided by its suggestion that the *Mediterranean Pools* case was limited to *per se* violations of the antitrust laws (R.D. 43, p. 30). Although the agreements in *Mediterranean Pools* were obviously highly anticompetitive, we know of no cases holding revenue pooling agreements to be *per se* violations of the antitrust laws any more than any merger agreement, a pooling of all resources by the merging companies, is *per se* unlawful. Further, the *Mediterranean Pools* decision stated that it was describing the "ground rules" applicable to all Section 15 agreements (9 F.M.C. at 288). It seems apparent that all anti-competitive combinations are not also *per se* violations of the antitrust laws. This is confirmed by the Supreme Court's decision in the *Travel Agents* case, which characterized the rule as applying with respect to "restraints which interfere with the policies of antitrust laws" and "once an antitrust violation is established" (36 U.S.L.W. at 4215).

Indeed, the Commission itself concedes its obligation to consider the policy of the antitrust laws in any Section 15 proceeding (R.D. 43, p. 31), a duty that is inconsistent with ignoring all but *per se* antitrust violations. We submit that the rule of the *Mediterranean Pools* case is quite evidently as applicable to mergers as to other "anticompetitive combinations", which "presumptively run counter to the public interest. . . ." (9 F.M.C. at 290.)

b. The Commission Did Not Find the Effect of the Merger Upon Competition to Be Insignificant.

Assuming, for purposes of argument, that the showing required to justify a merger having an insignificant effect upon competition would be much less than might otherwise be required, it is perfectly clear that the Commission made no such finding in this case. As we have already noted, the Commission declined to state what markets it regarded as being relevant for purposes of assessing the effect of the merger upon competition. The Commission said that it is sufficient to indicate the "danger areas" and that it need not determine the degree of concentration in the relevant market in order to determine whether the merger is in the public

interest.⁵⁴ Inasmuch as one of the "danger areas" detected by the Commission was the liner cargo market in the California-Far East trade, for which it found the merger would produce a "high degree of concentration" (R.D. 43, p. 35), this Court could not properly assume for purposes of judicial review that the degree of concentration produced by the merger would be insignificant. It would be for the Commission to make such a determination in the first instance. *Alaska Steamship Co. v. Federal Maritime Commission*, 344 F.2d 810, 825-26 (9th Cir. 1965); *Anglo-Canadian Shipping Co., Ltd. v. Federal Maritime Commission*, 310 F.2d 606, 613-17 (9th Cir. 1962).

Further, we think it clear that a proper appraisal of competitive effect requires the Commission to assess the effect of the merger on competition in the light of the California-Far East liner and U. S. flag liner cargo markets. The Commission's efforts to diminish the importance of these particular markets are erroneous, as we now demonstrate.

The Commission determined that the relevant geographical market would be "that portion of the United States which utilizes ocean transportation of freight between California and the Far East," and then discusses several possible relevant service markets (R. D. 43, p. 33). The Commission suggests that "settled consumer preference" is an appropriate test for determining the relevant service market (R. D. 43, p. 33), but inconsistently concludes that service by U. S. flag liners is not an appropriate market. The Commission correctly recognizes that "priority given by law to United States flag vessels with respect to MSTs and other government or 'preference' cargo . . . practically excludes the competition of foreign flag lines" (R. D. 43, p. 34), and it is undisputed in the record that MSTs and Government preference cargo con-

54. The Commission purported to follow doctrine applicable to ICC merger cases (R.D. 43, pp. 36-37), but ignored the part of that doctrine which calls for identification of "danger areas" by *determination* of market concentration through traditional market analysis concepts. *Great Northern Pacific & Burlington Lines, Inc.—Merger—Great Northern Ry. Co. et al.*, 328 I.C.C. 460, 511-18 (1966).

stitute a substantial portion of the liner cargo carried in the California-Far East trade (R. D. 43, App. F; Tr. 1085-89). This fact alone would seem to compel the conclusion that there is a very significant consumer preference for U. S. flag liner service.⁵⁵ Further, the Commission ignores the well-known fact of a strong national preference on the part of commercial shippers in foreign countries for the vessels of their own flag, which effectively isolates U. S. flag liners to a distinct cargo market as to which they can compete on equal terms, principally among themselves.⁵⁶ We have already noted the importance that the Maritime Administration has attached to maintaining competition among U. S. flag liners on this nation's essential trade routes (pp. 47-48, *supra*), and it seems pertinent to note that the CAB has long since decided that monopoly power among U. S. flag foreign commerce carriers is not offset by the existence of foreign flag competition. *Northeast Airline, et al. North Atlantic Routes*, 6 C.A.B. 319, 325 (1945). The Commission's failure to regard as highly significant the fact that the three merger applicants combined will have, respectively, 52% and 68% of the westbound and eastbound U. S. liner cargo market in the California-Far East trade is inexplicable (R. Exs. 32, 37; D. 43, App. G).

Having erroneously concluded against a relevant U. S. flag liner service market, the Commission undertakes the problem of cross-elasticity between liner and non-liner carriage. It finds "a substantial 'cross-elasticity of demand' between liners and non-liners" and "that the services are interchangeable to a very sub-

55. The Commission also notes that MSTs has recently established a competitive bidding system for the carriage of its cargo, but wholly fails to assess the effects of intentionally enhancing the merger applicant's financial strength and general competitive position vis-a-vis their U. S. flag competitors. Since the Government has already determined to allocate MSTs cargo on the basis of competitive bids, competitive power rather than Government direction will determine which U.S. flag liner carries this cargo (R.D. 43, p. 34).

56. The Supreme Court discussed the importance of flag preference in the steamship industry in its decision in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 484-86 (1958).

stantial extent" (R.D. 43, pp. 34-35). These conclusions are based upon percentage of traditional liner (commercial general) and non-liner (bulk) cargoes carried by non-liners and liners, respectively, and on an apparent loss of cargo by U. S. flag liners to foreign flag non-liners. However, the Commission's own decision shows that only 10% of westbound bulk cargo is carried on liners in the trade, and only 15% of westbound commercial general cargo is carried in non-liners. (R.D. 43, App. F.) These are far below the cross-elasticity percentages of interchangeable use found to establish a combined relevant service market in *United States v. Aluminum Co. of America*, 377 U. S. 271, 275-77 (1964).⁵⁷ In the light of these figures and the fact that 94% of all bulk cargo movement is in the Westbound trade (R.D. 43, App. F), it is clear that U. S. flag liner "losses" of cargo to non-liners since 1954 are representative of a tremendous growth of bulk cargo and corresponding non-liner carriage in the trade (R. Exs. 37, p. 3; 80). Rather than showing increased cross-elasticity, this situation is a clear demonstration of the lack of competition between liners and non-liners.

The Secretary of Commerce has decided that cargo carried by non-liners is not generally susceptible of carriage by U. S. flag liner vessels in Maritime Administration determinations of subsidy awards to promote adequate U. S. flag liner service on the nation's foreign trade routes. *United States Line—Subsidy, Route 12, P.&F.*, 5 SRR 671, 674 (Secretary of Commerce 1964). The Commission's own decision in this case spells out the characteristics of the services which make them non-competitive for the same classes of cargo.⁵⁸

57. The eastbound movement, which shows more apparent cross-elasticity, really reflects the consumer preferences of Far East shippers, including foreign flag preference, since there is virtually no U.S. flag non-liner eastbound carriage of either commercial general or bulk cargo. (R.D. 43, App. E.)

58. "Non-liner rates are lower than liner rates as a rule, while liners provide greater speed, generally with regularly scheduled service" (R.D. 43, p. 35).

2. **The Commission's Grounds for Mitigating the Effect of the Merger Are Impermissible.**
 - a. **The "Nature of the Shipping Industry" Does Not Provide a Proper Basis for Discounting the Anti-Competitive Impact of the Proposed Merger.**

The Commission discounts "the significance of respondent's aggregate share of the market" because of "the nature of the shipping industry", referring to the Commission's regulatory authority and asserted ease of market entry for new competitors (R. D. 43, p. 38).

The Commission reasons that, although foreign commerce shipping rates are "not as strictly regulated and supervised as in domestic transportation," Commission approved conference rate agreements make "virtually impossible" single carrier control of cargo rates and practices, and are an "effective safeguard against the evils attending monopoly." (R. D. 43, p. 38.) In support of this conclusion the Commission cites *McLean Trucking Co. v. United States*, 321 U.S. 67, 85 (1944), which used the last-quoted language in the context of the ICC's direct power to control rates in domestic commerce. By contrast, the Commission has no power to control rates in foreign commerce,⁵⁹ but it only has power to approve or disapprove *voluntary* agreements to fix rates. It is upon these voluntary agreements that the Commission rests its case for effective rate regulation. Nothing could be better calculated to disrupt the conference rate agreement system than the concentration of substantial competitive power in the hands of a single carrier.⁶⁰

59. Except to disapprove rates "so unreasonably high or low as to be detrimental to the commerce of the United States" (46 U.S.C. § 817 (b) (5)). Compare the Commission's power over *domestic* commerce water carriers to establish "just and reasonable maximum rate(s), fare(s), or charge(s)" (46 U.S.C. § 817(a), 46 U.S.C. § 845a). An approved conference agreement to fix rates leaves the parties free to raise or lower rate levels without any action by the Commission under Section 15 (46 U.S.C. § 814).

60. Cf. *Federal Maritime Board v. Isbrandtsen Co.*, 356 U. S. 481, 486 (1958), which suggests conference rate systems are vulnerable to an

Unlike the Commission, the ICC has the power to compel service by carriers and directly to regulate market entry. *Florida East Coast Ry. Co. v. United States*, 259 F.Supp. 993, 1009 (M.D. Fla. 1966), *aff'd per curiam* 386 U.S. 544 (1967). Somewhat more analogous, perhaps, is the CAB's regulation of air carriers in foreign commerce. The CAB has stated that regulation in foreign commerce is ineffective as a substitute for competition because the Board is without power to regulate rates and to compel service by foreign air carriers.⁶¹

The Commission's reliance upon an asserted ease of entry of steamship operators into the foreign trade is quite clearly misplaced. The ease of entry to which the Commission refers (R.D. 43, p. 39) pertains to entry by non-liner operators. The Commission apparently acknowledges that "it costs a great deal to set up and operate a regularly scheduled liner service" (R.D. 43, p. 39). This is confirmed by the large capital commitment required by Matson to start up a relatively small liner service in the California-Far East trade.⁶²

The Commission also regards "the existence of inter-flag competition" as a further factor diminishing the significance of the merger applicants' market share (R.D. 43, p. 39). Inasmuch as the market shares considered by the Commission already reflect the amount of cargo carried by foreign flag operators, it is difficult to see how the existence of such foreign competitors could be regarded as an off-set for the merger applicant's market share. The

outside competitor with substantial market power and a pervasive service system. One of the merger applicant's own witnesses stated that increased financial strength from merger would be "exceedingly important" in "rate wars" resulting from "opening of the rates by the Conference." (R. Tr. 1030-32.)

61. *American Export Airlines, Inc. Trans-Atlantic Service*, 2 C.A.B. 16, 32 (1940). The CAB has the same control over carrier rate agreements in foreign commerce under Section 412 of the FAA (49 U.S.C. § 1382) that the Commission has under Section 15.

62. Matson had made a capital commitment of \$46 million to start up a service employing only two vessels operating in the trans-Pacific trade (R. Ex. 152).

merger is certainly not likely to increase the competitive ability of foreign flag competitors.

b. Promotion of the Merger Applicants Is Not a Proper Consideration.

Referring to the declining percentages of commercial liner cargo carried by the United States flag vessels between 1954 and 1964 and recent mergers among Japanese lines, the Commission asserts that "it would serve the public interest of the United States to permit a merger that would improve the efficiency and ability to compete of U. S. flag vessels serving this as well as less profitable trades" (R.D. 43, p. 40). The Commission then asserts that this consideration is not inconsistent with its responsibility to avoid promoting one group of carriers to the exclusion of others, because it is concerned solely with the weight to be given a facet of anti-trust policy that is not applicable to foreign carriers. It seems to us that there are a number of infirmities in this analysis.

First, the evidence shows, as the Commission itself found (R.D. 43, p. 18), that the Japanese mergers were prompted by the imminent financial collapse of several of the lines involved. This is a circumstance that would have justified the Japanese mergers under the familiar "failing company" doctrine of our antitrust law. *Brown Shoe Co. v. United States*, 370 U.S. 294, 319 (1962); *International Shoe Co. v. FTC*, 280 U. S. 291, 302 (1930). But there is no similar justification for the instant merger (R. Tr. 812). Nor is the present concentration among Japanese carriers sufficient to justify the instant merger, inasmuch as the Commission found "the record does not indicate that any respondent or other American flag carrier has been affected as a result" of the Japanese mergers (R.D. 43, p. 18).

Second, the Maritime Administration is vested with the "promotional" functions under the Merchant Marine Act, 1936, and the Shipping Act, while the Commission is to devote itself to "regulatory" functions.⁶³ We have already referred to the Mari-

63. Reorganization Plan No. 7 of 1961 (75 Stat. 840); and see Message from President John F. Kennedy to Congress dated June 12, 1961, 107 CONG. REC. 9366, H.R. DOC. NO. 187, 87th Cong., 1st Sess. (1961):

time Administration's policy of encouraging competition among subsidized operators for the purpose of increasing the share of cargo carried by U. S. flag operators. It is obviously inappropriate for the Commission to decide merger cases on the basis of a promotional policy for which it has no responsibility.

Finally, the Commission ignores the interests of competing United States flag lines who are not at this stage included in the merger. The presumed answer for those lines would be themselves to seek merger partners for the purpose of increasing efficiency and eliminating "wasteful competition". The ultimate end of such a policy would be the merging of all U. S. flag carriers into a single entity.

c. Improvements in Efficiency and Economy Could Not in Themselves Justify the Merger.

It seems a self-evident proposition that improvements in economy and efficiency do not rise to the dignity of an urgent transportation need or an important public benefit. This would be so only if it were additionally shown that the carriers were in difficult financial straits or that service to shippers was jeopardized by inefficiencies. This is the whole thrust of the decisions discussed under Section A, above.

The Commission's reliance on decisions under the ICA in this regard is misplaced. The authority contained in the ICA for the ICC to approve mergers among railroad carriers is the manifestation of a long-standing congressional policy of *encouraging* mergers among railroads. When this policy was first adopted by Congress in 1920, it marked a sharp departure from the earlier policy of regarding competition as the desideratum of our railroad

"Intermingling of regulatory and promotional functions has tended in this instance to dilute responsibility and has led to serious inadequacies, particularly in the administration of regulatory functions. Recent findings . . . point to the urgent need for a reorganization to vest in completely separate agencies responsibility for (1) regulatory functions and (2) promotional and operating functions."

In the 1950 Reorganization Plan, to which the 1961 Plan refers, Section 15 administration is listed as a regulatory function. (Reorganization Plan, No. 21, 1950, 64 Stat. 1274-75.)

economy, and the Act then adopted specifically directed the Commission to develop a plan for consolidation of the railroads of the United States into a "limited number of systems" (41 Stat. 481). In the Transportation Act of 1940 the ICC was relieved of its responsibility to develop a plan of consolidation, but the Act "expresses clearly the desire of the Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification."⁶⁴

In contrast, the Congress that adopted the Shipping Act regarded preservation of competition in the shipping industry as a desirable goal and sought to create a regulatory climate that would discourage the tendency toward wholesale mergers among competing lines. (See discussion at pp. 16-18, *supra*.) It must be supposed there is an entirely proper area for the consolidation of operations and the merger of steamship companies. The development of new transportation systems, with the elimination of horizontal competition absent or, to the extent involved, justified by a showing of public benefit or transportation need, or the integration of passenger services, may be considered as examples. Of course, none of these factors has been established in this case. The lack of congressional guidelines in this area confirms, in our view, not only that Section 15 does not encompass mergers, but also that the same policies motivating Congress in enacting the merger provisions contained in the ICA were not before, or considered by, Congress in adopting Section 15.

64. *Baltimore & Ohio R. Co. v. United States*, 386 U.S. 372, 387 (1967). *Accord*, *Maintenance Employees v. United States*, 366 U.S. 169, 173 (1961); *County of Marin v. United States*, 356 U.S. 412, 417-18 (1958). For a brief summary of the history of the consolidation provisions of the Interstate Commerce Act, see *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298, 315-321 (1954).

Even so, the I.C.C. will not "depreciate the values of competition . . . reflected in the financial health of the merger applicants", *Great Northern Pacific & Burlington Lines, Inc.—Merger—Great Northern Railway Co.*, 328 I.C.C. 460, 525 (1966). See also *Southern Pacific Co.—Control—Western Pacific R. Co.*, 327 I.C.C. 387, 404-05 (1965). So-called "economy and efficiency" consolidations were disapproved in both these cases.

d. The Existing Degree of Concentration Among the Merger Applicants Is Not a Justification for Merger.

After a discussion of the merger "benefits" the decision advances its final reason for discounting the anticompetitive effects of the merger. As we understand this reasoning, it is that the legality of all prior acquisitions of stock leading to concentration among the three companies is to be presumed, and the only thing now cognizable under the antitrust laws or the Shipping Act is the incremental effect on competition of the final step here contemplated. Thus, the decision asserts that "the presence of AML as a separate party to the merger agreement is of little practical significance under the Act," for the reason that APL already owns 93% of AML's stock (R.D. 43, p. 42).

It could also be added that Natomas and Mr. Davies combined already own 51% of APL's stock and 43% of PFEL's stock. In both instances, this constitutes control (R.D. 43, p. 4). But these are not reasons for discounting the anticompetitive consequences of the arrangements. None of these stock acquisitions was ever approved by the Commission, nor has any been called upon to pass muster under the antitrust laws (R. Tr. 59-60). There is certainly no doctrine that excludes prior acquisitions from the reach of the antitrust laws. Indeed, even a merger lawful when entered into is subject to being later found in violation of Section 7 of the Clayton Act. *United States v. E. I. duPont de Nemours, Inc.*, 353 U.S. 586, 597-98 (1957).

C. THE COMMISSION'S DECISION FAILS TO MAKE REQUISITE FINDINGS OF PUBLIC BENEFIT OR TRANSPORTATION NEED FOR THE MERGER.

Consistent with its conclusion that applicants need not justify the proposed merger as being necessary to accomplish some recognizable objective of the Shipping Act, the Commission in fact makes no findings that the public interest or the needs of the nation's transportation system require the merger. Rather, it simply concludes that the "benefits of the merger outweigh any potential injury" (R.D. 43, p. 43). It is clear, even so, that the principal "benefit" is to be found in the supposed increased

"efficiency" of operation and financial savings resulting primarily from the elimination of employees.⁶⁵

Absent from the Commission's decision, as well as from the record evidence, is any showing that the various improved "efficiencies" are in any way required for any of the merger applicants to continue as highly effective and prosperous steamship operators, fully capable of developing their respective fleets and services as may be determined desirable. Indeed, not only has each of the applicants realized substantial earnings over the years, but the foreign trade steamship services of each are underwritten by the United States Government in the form of operating-differential subsidy contracts, and substantially all of their vessels have been built with the aid of construction-differential subsidy (R. Exs. 41, pp. 1-4; 43A, 43C, 91, 176).⁶⁶

65. The decision contains a section entitled "Benefits of the Merger" (R.D. 43, pp. 13-18), which paraphrases a similar division in applicant's brief to the Examiner and lists essentially the same six "benefits," *i.e.*, improved management, administrative economies, improved sailing coordination, increased financial strength, enhanced ability to meet changes in transport methods, and the Japanese mergers. We confess some puzzlement at the classification of the Japanese mergers as one of the "Benefits of the Merger".

66. The Commission concedes that each of the merger applicants "is in good financial condition" (R.D. 43, p. 16). The record bears the Commission out many fold (R. Exs. 16, 18, 20, 21):

(1) In 1965 the net earnings and return on common equity for each of the three applicants was as follows:

	Net Earnings (\$000)	Return on Common Equity Per Cent
AML	3,219	12.0
APL	5,471	9.6
PFEL	4,617	17.2

(2) Each company had substantial retained earnings at the end of 1965 as follows:

AML	\$25,448,000
APL	\$55,531,000
PFEL	\$23,483,000

(3) Each company receives substantial amounts of operating-differential subsidy from the Government, amounting in 1965 for each company as follows:

AML	\$ 6,578,000
APL	\$19,791,000
PFEL	\$ 6,734,000

We assume for purposes of the ensuing discussion that applicants would save as a result of merger approximately \$950,000 annually by eliminating from the shipping industry administrative personnel now required to maintain applicants' separate, competing organizations (R.D. 43, pp. 13-14), that there would be other unmeasurable financial benefits resulting from consolidation of respondents' subsidized assets (R.D. 43, pp. 16-17), and that combination of the three fleets would provide greater scheduling flexibility (R.D. 43, p. 15). We next ask, who would benefit from, and what is the need for, these increased efficiencies?

The Commission does not rely heavily upon the "benefit" of strengthened management noting that "the three companies have been and are now well managed", that the real benefit would be increased "management capacity" resulting from "optimum utilization of the best managerial talent of all three companies" and that no further demonstration of management benefits was offered or required because "it was not in the best interests of the companies to be specific" (R.D. 43, pp. 13-14). The Commission did not consider the public and national defense interest in maintaining a broad base of management personnel in the shipping industry of the United States or whether management improvements could be accomplished by means other than merger.

There is certainly substantial question whether elimination of management personnel is beneficial or detrimental to the public interest. The CAB has considered that establishment of competitive U.S. flag foreign commerce carriers is desirable because of the national defense interest in "training of additional American supervisory . . . personnel." *American Export Airlines, Inc., Trans-Atlantic Service*, 2 C.A.B. 16, 33 (1940). The Supreme Court recently held that mergers among banks, a "highly regulated industry,"⁶⁷ cannot be justified in the interest of curing management deficiencies unless there is a showing of reasonable efforts to cure these problems by other means. *United States v. Third National Bank in Nashville*, 36 U.S.L.W. 4178, 4183-84 (U.S. March 4, 1968).

67. *United States v. Philadelphia National Bank*, 374 U.S. 321, 372 (1963).

The Commission concludes it is not material that the stockholders of the merging companies will benefit from the economies to accrue from the merger because efficiency and economy are inherently in the public interest, relying on Interstate Commerce Commission merger cases (R.D. 43, p. 41). The decision then refers to its earlier discussion of merger benefits, noted above.

While it may not be material in an invidious sense that applicants' stockholders will be the principal financial beneficiaries of the merger, it *is* material that the economies producing these stockholder benefits are not necessary for any other purpose. As we have already discussed (pp. 59-60, *supra*), we must deny that there is any public interest under the Shipping Act in effecting anticompetitive agreements solely for the sake of economic benefit to those so agreeing or combining.⁶⁸

In its earlier discussion of the "benefits" (R.D. 43, pp. 16-17), the Commission makes an apparent effort at least to suggest the existence of a need for greater financial strength. Thus, after finding that "each of the three respondents is in good financial condition, and they do not assert to the contrary," the decision lists a series of countervailing makeweights, as follows:

a. In a seeming effort at once to minimize the applicants' financial strength and to denigrate the substantial tax advantages that accrue to applicants from their subsidized status, the Commission advances the highly dubious proposition that applicants' statutory reserves "would become, to a considerable extent, sub-

68. Certainly no such suggestion arises from Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (1963), upon which the initial decision so heavily relies. There the Commission specifically stated that its decision was predicated on "the beneficial effects this proposed merger will have upon rail patrons and the public generally rather than upon the financial gains that may accrue to the stockholders of the merged company" (320 I.C.C. at 161).

As the Supreme Court has recently held in a case where it was argued that substantial lessening of competition was overcome by increased financial strength of the merged company, the merging companies must show specific "beneficial consequences" and the "value of these additions" to the public rather than the stockholders of the merging companies, *United States v. Third National Bank in Nashville*, 36 U.S.L.W. 4178, 4182-84 (U.S. March 4, 1968).

ject to Federal income tax if used for purposes other than new vessel construction (R.D. 43, p. 16).⁶⁹ Even if this were true, the availability of a tax free fund for new vessel construction could hardly be regarded as a financial hardship to a steamship company.

b. The decision then devotes a paragraph to the problems that some of applicants have had in collecting current ODS as a result of alleged quarrels with the Maritime Administration, and suggests that the exigencies created thereby would be ameliorated by merger and the consequent creation of a "common till" for subsidy funds (R.D. 43, p. 16). As a study in administrative consistency, it is interesting to compare the discussion of this somewhat tenuous and speculative "benefit" arising from the merger of subsidy funds with the decision's earlier forthright rejection of the suggestion that the Commission should consider the consequences of a substantial loss in Government recapture of subsidy money resulting from consolidation of the subsidy funds into a common till (R.D. 43, pp. 12-13).⁷⁰

c. The decision asserts that the abnormal demands of Vietnam contribute to the present prosperity of applicants but makes no reference to the evidence that earnings and vessel utilization were reasonably good before this nation's sharply escalated involve-

69. As subsidized operators, respondents' earnings deposited in their reserve funds avoid all current federal income taxes and are tax deferred under Section 607(h) of the Merchant Marine Act, 1936 (46 U.S.C. § 1177). As a practical matter, no federal income taxes will be paid on such funds so long as respondents continue to operate as subsidized steamship companies.

70. Thus, the decision correctly notes that the immediate effect of creating a merged recapture status for the three lines would be the elimination of a substantial amount of Government recapture of excess earnings from PFEL (although the more current figure is \$5,809,000 as of December 31, 1966 (R. Ex. 62; Tr. 941-42), rather than the \$3,465,000 referred to in the decision), but then expresses the hope that this particular consequence would be ameliorated by increased earnings and by the special intercessions of the Maritime Administration, and finally concludes that "protestants' contentions of probable detriment to the public interest in connection with the ODS contracts of respondents are without substantial merit".

ment in Vietnam (R. Exs. 175; 104A, p. 19; 41, pp. 1-3; 104B, p. 7) and that the westbound movement of commercial general cargo has continued to increase (R. Ex. 37, pp. 1, 3-4).

d. Finally, the Commission's decision asserts that "respondents are no exception to the general rule that shipping companies historically have not been attractive to investors" (R.D. 43, p. 16). This statement is apparently made in a very general sense without reference to the considerable interest that the Natomas Company, which presently controls all three applicant lines, has manifested in acquisition of their stock (pp. 3-4, *supra*). Moreover, there is no evidence that applicants have experienced difficulty in raising capital for new ship construction. (R. Tr. 200, 355-62; Exs. 16, pp. 2, 4; 18, pp. 2, 4; 20, pp. 2, 4.)

On the basis of the foregoing list of reasons, the initial decision concludes: "That the three respondents separately *are not in evident financial straits at the moment* is not reason to discount the benefit of improved financial strength" (R.D. 43, p. 16, emphasis ours). Of course, the record demonstrates that respondents have been in a good financial position for at least ten years and that their prospects for the future are extraordinarily good. The foregoing italicized characterization of that financial position must strike one as a rather remarkable understatement.

But assuming that the applicants' present good financial condition is not in itself reason for discounting a still greater enhancement of that financial position, we are still left to wonder what public benefit will result or transportation need thereby be served. The Commission suggests that applicants will have an "enhanced ability to meet expected changes in ocean transport methods" (R.D. 43, p. 16). Specifically, the decision refers to the trend toward containerization in the Pacific Coast/Far East trade; suggests that applicants' strengthened financial position "would facilitate" expenditures for necessary container vessels and equipment, and "that there may be some advantage" to a larger operator in acquiring priority use of shore-side facilities; and refers to Matson's arrangements with Japanese lines for use of shore-side facilities in Japan. Finally, the decision suggests that with a larger

fleet applicants will have a greater opportunity to develop specialized vessels (R.D. 43, pp. 16-17).

We submit that this kind of speculation hardly rises to the dignity of a finding that improvement in applicants' financial position is required for them to develop containerization and to keep abreast with modern technological changes. Indeed, applicants themselves have made no such claim (R. Tr. 254-58, 262; 400-02). PFEL has already placed an order for six LASH type vessels, and APL intends to construct similar type vessels as soon as construction subsidy funds become available (R. Tr. 792-95). It is clear that applicants have no intention to build vessels for use in the Far East trade until subsidy is made available therefor, whether or not the proposed merger is consummated (R. Tr. 254-63, 359-61).⁷¹

As for the suggestion that combination of carriers is desirable in developing shore-side facilities for containerization, there is no finding that elimination of competition among steamship companies is necessary for them to cooperate for that purpose. Indeed, applicants at the present time maintain a joint terminal facility in Los Angeles (R. Tr. 696). As the Commission's decision notes, Matson's plans for an unsubsidized Far East container service include cooperation with a Japanese line for the purpose of developing shore-side container facilities (R. Tr. 1761-65). On cross-examination, APL's president readily admitted that APL's planning for terminal facilities in Japan "would have to be in conjunction with other lines and probably with one or more of the large Japanese combines. I think we would find ourselves in the same position as Matson with NYK" (R. Tr. 401).⁷²

71. The ICC considers merger justified by investment needs when "profits are not sufficient . . . to make improvements important to the national interest." Penn-Central Merger Cases, 389 U.S. 486, 501 (1968). See also Penn-Central Merger Case, 327 I.C.C. 475, 499-501 (1966).

72. It is clear from the record (Tr. 400-01) that the Japanese Government will not permit a United States flag line to own terminal facilities in Japan, either independently or in conjunction with a Japanese line. Thus, under current Japanese policy, respondents will by necessity be required to cooperate with Japanese maritime interests for the development of shore-side facilities in Japan.

The only finding of a public benefit contained in the Commission's decision is the suggestion the merger will result in "improved transportation service, *to minor ports in particular*, through coordination of sailings" (R.D. 43, p. 41, emphasis ours). But at an earlier point the Commission's decision more accurately reflects the state of the record when it states that "alternating some of the *minor ports* among vessels of the combined fleet would, according to company estimates, *eliminate as many as two ports per voyage* with a consequent saving in turnaround time" (R.D. 43, p. 15, emphasis ours). APL's president estimated that by thus reducing the service at small ports, the combined fleet could increase its annual voyages from 90 to 94. He was not certain, however, whether the additional voyages would be made, but, in either case, the merged company's profits would increase. (R. Tr. 250; Ex. 12, pp. 10-11.)

While there can be little doubt that this practice of concentrating on high volume ports will tend to maximize applicants' profit, we hardly think this can be fairly characterized as an improvement in service to "minor ports in particular." On the contrary, it seems self-evident that this policy would not be beneficial to shippers who had grown accustomed to a regular service to marginal ports. As for the major ports, the service is so frequent already that it is doubtful the shippers would be materially affected even if applicants did increase service there (R.D. 43, App. D).

D. THE COMMISSION ERRED IN FAILING TO COMPEL RESPONDENTS TO COME FORWARD WITH A PLAN FOR MERGER AND OTHER INFORMATION ESSENTIAL TO A FULL APPRAISAL OF THE MERGER.

The Commission issued its approval of applicants' merger without *any* record evidence of the form which the merger would take, the terms of agreement governing the consolidation transaction, the plans for operation of the consolidated enterprise, applicants' plans for protection of displaced employees, and the impact of the merger upon subsidy recapture, as well as numerous other aspects of the merger. Because of this failure, the

Commission has given *carte blanche* to the merger without "pre-transaction scrutiny"⁷³ of the course applicants will actually follow under the umbrella of Commission approval.

It was to these deficiencies in the record and the Commission's decision that Commissioner Hearn directed his dissent in this case (R.D. 43, pp. 48 et seq). This deficiency is underscored by the position taken by Commissioner Fanseen, who joined the plurality opinion of the Commission on the basis that while "further evidentiary hearing could possibly uncover conduct contrary to the public interest . . . further delay in the instant proceeding is an unnecessary burden on the administrative process . . ." and it "is in the interest of maintaining the integrity of the administrative process that the litigation before us now be terminated." (R.D. 43, pp. 45-46.) The Commission has thus abdicated the affirmative role the Commission or any agency charged with protection of the "public interest" must assume in developing a complete record upon which to render its decision.⁷⁴

We next discuss the several respects in which the Commission failed completely to require the production of evidence essential to a full appraisal of applicants' merger.

1. Plan and Terms of Merger.

Agreement No. 9551 asked for approval to "merge or consolidate . . . in the form and by the procedures as the directors and the stockholders of the three companies should approve" (R. Ex. 14, p. 2). The Commission was fully aware that it did not and

73. See R.D. 36, p. 12. The approval in this case was not only "pre-transaction" but pre-agreement, as well.

74. *Isbrandtsen Co., Inc. v. United States*, 96 F.Supp. 883, 892 (S.D. N.Y. 1951) (3-judge court), *affirmed by equally divided court sub nom A/SJ. Ludwig Mowinckels Rederi v. Isbrandtsen Co., Inc.*, 342 U.S. 950 (1952); *Anglo-Canadian Shipping Co. v. United States*, 264 F.2d 405, 411 (9th Cir. 1959). See also *Michigan Consolidated Gas Co. v. FPC*, 283 F.2d 204, 224 (D.C. Cir. 1960), *certiorari denied* 364 U.S. 913 (1960); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965) ("The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant factors.").

would not have a merger plan before it if it approved Agreement No. 9551 as submitted (R.D. 36, p. 3). As Commissioner Hearn noted, the applicants "apparently do not know yet what it [the plan] will be, in many respects" (R.D. 36, p. 25). Commissioner Hearn believed that the Commission was entitled to "at least as much information *prior* to its decision" as applicants' stockholders, the SEC, and various underwriters and banks will receive (R.D. 43, p. 49).

In *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), the Court made it clear that only anticompetitive agreements actually filed with the Commission and specifically approved can be exempted from the antitrust laws. This scheme of regulation is based upon close administrative scrutiny of the arrangements between competing steamship lines. Again, in *Volkswagenwerk A.G. v. FMC*, 36 U.S.L.W. 4197, 4201 (U.S. March 6, 1968), the Court reversed a Commission policy of limiting its responsibilities under Section 15 and reaffirmed the congressional intent to "subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry." If, as it claims, the Commission has jurisdiction over mergers under Section 15, it has the affirmative duty to demand that the actual merger agreement, embodying the plan for consolidation, be filed and closely examined before it invests the merger with antitrust immunity. Otherwise, the merger plan will remain an unfiled, yet supposedly approved, Section 15 agreement that has never been examined by the Commission.

The Commission's sister agencies, the ICC and the CAB, require that an agreed plan and terms of merger be filed and carefully examined under their respective merger jurisdictions.⁷⁵ The

75. 49 C.F.R. §§ 52.2(c)(2), 52.3(b)(7); Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122, 143-46, 190-93, 198-99 (1963); Arizona-Monarch Merger, 11 C.A.B. 246, 260 (1950); Monarch-Challenger Merger, 11 C.A.B. 33, 34 (1949).

The ICC and CAB both require that merger applications include "just and reasonable" terms of payment or exchange of stock to protect the public interest (49 C.F.R. §§ 52.2(c)(2), 52.3(b)(7); Arizona-Monarch Merger, *supra*; TWA, Control by Hughes Tool Co., 12 C.A.B. 192, 197

plan of consolidation has been examined and approval conditioned on limitations even when no actual change in control was effected by the plan. *Pan American Airways, Inc., et al. v. Meyer*, 2 C.A.B. 503 (1940). Their practice stands in marked contradiction to the Commission's summary dismissal of this deficiency.

2. Plan of Operation for the Acquired Carriers.

Commissioner Hearn believed the Commission should insist upon "the service description of the merged company . . . especially as to the effect on itineraries due to LASH operations," and a description of how "the LASH operation [will] be integrated into the merged company" (R.D. 43, pp. 53, 54; D. 36, p. 27). Again the Commission was satisfied with the state of the record without that information (R.D. 43, p. 2). These questions were raised by the alleged "benefits" of the merger advanced by respondents in the first instance, principally the assertion that sailing coordination and removal of vessel overlap would be made possible as a result of the merger. (See R.D. 43, pp. 14-15.) As the Commission's decision reflects, this "benefit" was presented in general terms without any particular reference to the imminent inclusion in the merged fleet of LASH vessels or other types of container vessels.

Once again, the Commission considers its merger responsibilities are less demanding than those of its sister agencies. The CAB believes "it is necessary to consider the overall impact of the acquirer's plans and policies with respect to the controlled carrier." *TWA, Control by Hughes Tool Co.*, 12 C.A.B. 192, 196 (1951). The ICC requires complete information as to "the effect of the proposed transaction upon adequate transportation service to the public" (49 U.S.C. § 5(2)(c)), and it has recently conditioned a merger approval upon confining effects upon existing

at n. 11 (1951), and cases cited). These agencies consider their "public interest" responsibility necessitates this information for the protection of the shipper and investor against absorption of excessive acquisition costs, *National Caribbean-Atlantic Control Case*, 6 C.A.B. 671, 677-680, 682 (1945), and to guard against premiums being paid for operating authority, *Acquisition of Marquette by TWA*, 2 C.A.B. 409, 413-13 (1940).

service facilities to those specified in the applicants' merger plan. See *Penn-Central Merger Case*, 389 U.S. 486, 501 (1968).

3. Protection of Displaced Employees of the Merging Carriers.

The Commission disowns any concern or responsibility for conditioning merger approval upon applicants' making adequate provision for employees who will be displaced as a result of the merger, considering this matter "a part of management discretion" (R.D. 43, p. 2). The Commission is concerned by the fact that it and its predecessors have never before ventured into the "area of labor management relations" (R.D. 43, p. 2). Of course, it can also be said that the Commission and its predecessors have never before specifically ventured into the area of approving carrier consolidations. Fifty years after the passage of the Shipping Act the Commission reaches for jurisdiction over carrier consolidations, but it does not want to disrupt "the integrity of the administrative process" by doing the whole job. (R.D. 43, p. 46, concurring opinion of Commissioner Fanseen.)

True enough, there is no statutory provision for the Commission to consider employee protection, as there is in the case of the ICC (49 U.S.C. § 5(2)(c), (f)), but neither is there any statutory mandate for the Commission to embark upon the approval of carrier consolidations. However, there is clear precedent for this Commission to assert authority and responsibility for displaced employee protection under the "public interest" standard of Section 15 and its power to condition or modify agreements before approval.⁷⁶

4. Other Factors.

Commissioner Hearn pointed to several other matters that the Commission was unable to evaluate because of the incomplete

76. See *Oling v. Airline Pilots Association*, 346 F.2d 270, 274-75 (7th Cir. 1965), *certiorari denied*, 382 U.S. 926 (1965). The CAB was in the same position as this Commission, having no statutory authority to consider employee protection plans in merger cases, but the courts found such consideration a necessary incident of its merger jurisdiction.

record before it. These include the effect of the merger on subsidy recapture and value received for the subsidy dollar, the effect on commerce of decreased competition for MSTs cargo, whether the benefits to the merger applicants would be paralleled by concomitant service benefits, and the specific respects in which the merger would benefit development of a container program and acquisition of shore facilities in Japan (R.D. 43, pp. 53-54).

These and many other matters quite obviously would have been explored had the Commission followed the guidelines developed by the Interagency Committee on Transport Mergers discussed in Section A, above. They are the kinds of matters that the other regulatory agencies that do have merger jurisdiction routinely explore.

For purposes of the present discussion, it may be assumed that once the plan of merger and its consequences are fully developed, it can be demonstrated to serve the public interest. However, until such time as the record is fully developed, we fail to see how the Commission could adequately discharge its asserted jurisdiction to approve the instant merger and immunize it from the antitrust laws.⁷⁷

CONCLUSION

In view of the foregoing considerations, this Court should:

1. Enjoin, set aside and vacate the order here under review as invalidly entered in excess of the Commission's jurisdiction.
2. If contrary to Matson's contentions the Commission be held to have jurisdiction to approve the agreement as a merger agreement and immunize the merger from the antitrust laws, then enjoin, set aside and vacate the order here under review and

77. It seems obvious that until the Commission had been fully informed, it could not discharge its obligation to weigh "the competitive effect against the asserted benefits to the community. . . . To weigh adequately one of these factors against the other requires a proper conclusion as to each." *United States v. Third National Bank in Nashville, et al.*, *supra* at 4178.

remand the matter to the Commission for it to take such further action as may be necessary to determine the lawfulness of the merger in the light of the applicable standards above discussed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules; and I further certify that I have examined the provisions of Rule 39 of said rules.

I further certify that I have this day served a copy of the foregoing brief on each party of record by mailing a copy thereof via first class mail, postage prepaid, to the attorney of record for each such party.

Dated at San Francisco, California this 15th day of April, 1968.

JOHN E. SPARKS

(Appendix Follows)

Appendix A

The full text of Section 15, Shipping Act, 1916, as amended, (46 U.S.C. § 814) is as follows:

"Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements

between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to non-contract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title shall be excepted from the provisions of Sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not

more than \$1,000 for each day such violation continues, to be recovered by the United States in a civil action: *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section."

RECEIVED COPY OF THE WITHIN

THIS _____ DAY OF _____ 19 _____

ATTORNEY ____ FOR _____

